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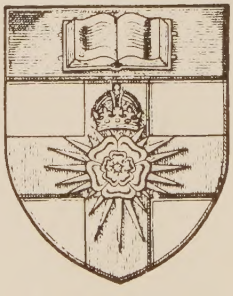

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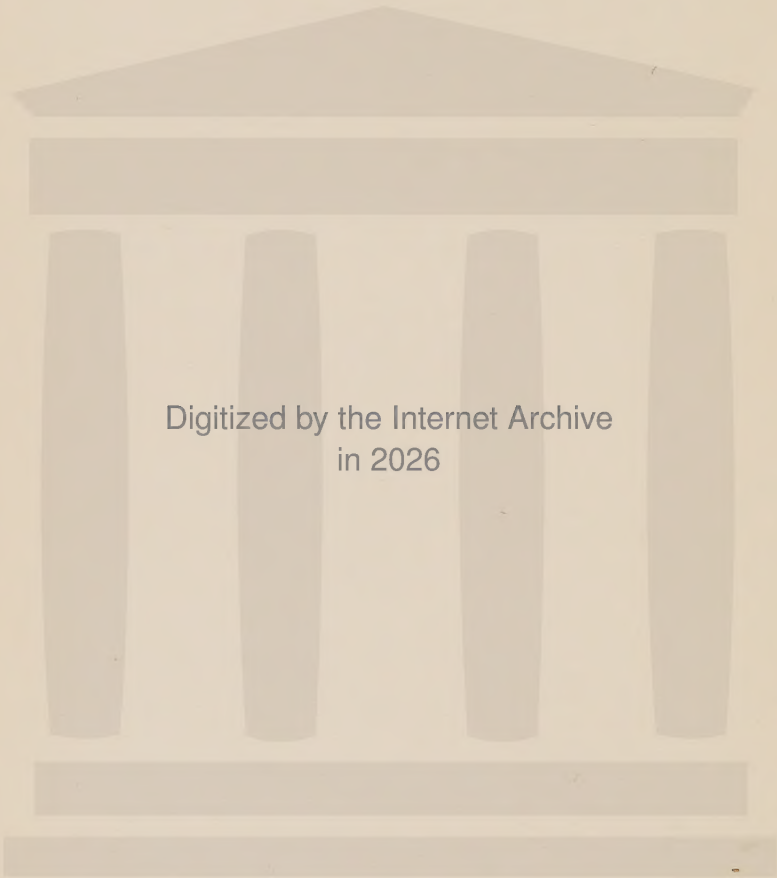

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THE NORTHERN IRELAND LAW REPORTS

1945.

THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

M. G. ELLISON,

ONE OF HIS MAJESTY'S COUNSEL.

1945

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Lord Chief Justice:

THE RIGHT HON. SIR JAMES ANDREWS, BART.

Lords Justices of Appeal:

THE RIGHT HON. ANTHONY BRUTUS BABINGTON.
THE RIGHT HON. EDWARD SULLIVAN MURPHY.

Chancery Division:

THE HON. ARTHUR BLACK.

King's Bench Division:

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ERRATA.

Pages 99 to 124, inclusive, for headings "Court of Appeal," read "King's Bench Division," and in side-notes, for "C.A." read "K.B.D."

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DEATH OF SIR WILLIAM MOORE, BARONET,

Former Lord Chief Justice of Northern Ireland.

On November 29th, 1944, in the presence of a large and representative attendance of the Bench and Bar and of the Incorporated Law Society who were assembled in the Nisi Prius Court, the Lord Chief Justice (Sir James Andrews, Bart.), in the course of an eloquent tribute to the memory of Sir William Moore, Bart., the second Lord Chief Justice of Northern Ireland, said that in 1917 Sir William was appointed to the Bench of the High Court of Justice in Ireland and soon gained the reputation of a patient and painstaking Judge who consistently upheld the honour and dignity of his office. After the passing of the Government of Ireland Act, 1920, he elected to be transferred to the newly-created Supreme Court of Judicature in Northern Ireland in which for four years he served as a Lord Justice of Appeal, and subsequently for twelve years as Lord Chief Justice until his resignation in 1937, precisely fifty years after his entry into the profession. One of the special features of his professional life and work was his emphatic insistence at all times upon the absolute independence of the courts from all executive control. The honest and strictly impartial administration of justice was to him something far too precious to permit of any interference from any Department of State however well-intentioned such interference might be. Of nothing was he more jealous than the maintenance of the highest standard of professional honour. He was at all times the upholder and guardian of the traditions of our profession which have come down to us from ancient days, which unite us in thought and gratitude with the legal giants of the past and which are to-day our priceless heritage. The passing of William Moore will leave a blank in all our lives. A warm-hearted and kindly man of the highest honour and of the noblest ideals, he enjoyed the confidence and affection of a host of friends both inside and outside our legal circle ; they will long mourn his loss and honour his memory.

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

IN RE BRAND, DECEASED.

K.B.D. (Revenue.) 1943.

WILSON AND ANOTHER, PETITIONERS; MINISTRY OF FINANCE FOR NORTHERN IRELAND, RESPONDENTS.

Dec. 15, 16, 17. 1944. July 11.

Estate Duty—Leasehold premises—Excessive rent—Whether debt or incumbrance—Value—Methods of assessing—"Minus" Value—Appeal from Ministry—Finance Act, 1894, *secs.* 7, 10, 17—*Finance* (1909-10) *Act*, 1910, *sec.* 60—*Finance* (*No.* 2) *Act* (*N.I.*), 1940.

B. held a hotel as tenant under a Lease, dated 23rd December, 1937, for a term of 21 years, at a yearly rent. B. died on 16th August, 1940. The Petitioners, as B's executors, alleged that the rent reserved by the Lease was excessive at the date of B's death and constituted a liability of B's estate and claimed that in computing the value of the premises for Estate Duty purposes an allowance or deduction ought to be made of the capitalised amount by which the reserved rent exceeded the yearly rent at which the premises could have been let on 16th August, 1940. The Ministry of Finance valued B's interest in the leasehold premises at "*Nil*," contending that the rent reserved by the Lease truly represented the letting value of the premises at the date of B's death.

On appeal, pursuant to the Finance Act, 1894, section 10 (1) and Order LXVIII, rr. 62 *et seq.*, of the Rules of the Supreme Court (N.I.), 1936.

Held (by Black, J.), that the question in dispute being as to the value of leasehold property the proper method of appeal was that prescribed by section 60 (3) of the Finance (1909-10) Act, 1910, and that the present appeal under section 10 (1) of the Finance Act, 1894, did not lie.

Methods of assessing for estate duty purposes the value of property let at an excessive rent considered.

K.B.D. (Revenue). 1943.

IN RE BRAND, DECEASED: WILSON AND ANOTHER, Petitioners; MINISTRY OF FINANCE FOR NORTHERN IRELAND, Respondents.

BLACK, J.

APPEAL under the Finance Act, 1894, section 10. The facts are stated in the judgment.

Porter, K.C., and *Patton* for the petitioners.

Curran, K.C., and *Nicholson* for the respondents.

Cur. adv. vult.

BLACK, J.: This case comes before the Court by way of appeal under the provisions of section 10 of the Finance Act, 1894, against a decision of the Ministry of Finance for Northern Ireland in regard to the amount of estate duty claimed by the Ministry in respect of the estate of the late Mr. Thomas Brand. The petitioners are the executors of Mr. Brand who died on the 16th day of August, 1940. They claim to be aggrieved persons within the meaning of section 10 (1) of the Act of 1894, and they have adopted the procedure prescribed by Rules of the Supreme Court, Order LXVIII, rr. 62 *et seq.*, for appeals under that section. The questions in issue between the petitioners and the Ministry arise in relation to certain premises known as the Imperial Hotel, situated in Donegall Place, Belfast, which were held by Mr. Brand under a Lease dated 23rd December, 1937, for a term of 21 years from 1st December, 1937, at a yearly rent of £2,275. The petitioners allege that this rent was grossly excessive, and that the ownership of this lease of the hotel constituted a liability of the deceased's estate. They, therefore, contend that in computing the value of the estate for the purposes of estate duty an allowance or deduction ought to be made of the capitalised amount by which the rent reserved by the lease exceeded the rent at which the hotel could have been let at the date of the death of the deceased.

The hotel is an old building but its recent history—so far as appears to be relevant—is shortly as follows:—It was purchased in 1918 by a Captain Morgan who died about 1920. His widow let the hotel to a Mr. Tompkins at a rent of £2,400 a year for the premises and £1,405 a year for the furniture. Tompkins' lease expired in 1932 and he obtained an extension of his

tenancy for three years at a rent of £2,250 for the hotel without the furniture. Tompkins failed in business and went out of possession of the premises in March, 1935. In the meantime the premises had been acquired by the Ulster Arcade (Brand's) Ltd.—a limited company controlled by the late Mr. Brand. Mr. Brand conceived the idea of taking over the hotel himself and modernising it. Accordingly he bought the stock-in-trade from Tompkins' trustees and proceeded to carry out very extensive alterations and improvements. Upon structural alterations and improvements he spent over £12,000 and in addition he expended £5,000 in renewing furniture and utensils. In 1937 Mr. Brand negotiated a sale to the Prudential Assurance Company of the large block of property in Donegall Place, Castle Lane and Callender Street owned by the Ulster Arcade (Brand's) Limited, of which the Imperial Hotel premises formed part. The purchase price for the whole property was agreed at £113,500 and part of the bargain was that Mr. Brand should take a lease of the hotel premises for a term of 21 years at a yearly rent of £2,275. The sale to the Prudential Assurance Company was duly completed and in accordance with the arrangement which had been made the Prudential Assurance Company executed to Mr. Brand the lease of 23rd December, 1937, which was the lease under which Mr. Brand held the premises at the time of his death.

Mr. Brand died on the 16th August, 1940, and on the 5th May, 1941, the hotel premises were severely damaged by enemy action. By letter dated 13th May, 1941, from petitioners' solicitors to the Prudential Assurance Company the petitioners claimed to be entitled by virtue of section 40 of the Landlord and Tenant (Ireland) Act, 1860, to surrender the premises and to be discharged from all obligations in the lease upon payment of all rent and arrears due. The lessors repudiated this claim and it was not persisted in presumably because the fact that the lease contained an express covenant to repair was considered to take it outside the provisions of section 40. However, the Landlord and Tenant (War Damage) Act (Northern

K.B.D. (Revenue). 1943.

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BLACK, J.

Ireland), 1941, became law on the 14th October, 1941. On the 5th November, 1941, the petitioners served a Notice of Disclaimer under the provisions of this Act. On the 5th December, 1941, the lessors replied with a notice to avoid disclaimer, and on 7th January, 1942, they instituted proceedings in the Belfast Recorder's Court for a declaration that part of the premises was capable of beneficial occupation and for an order fixing the rent to be paid by the petitioners. These proceedings were eventually settled out of Court on the basis that the Prudential Assurance Company would accept a surrender of the lease on payment by the Petitioners of a sum of £500 by way of damages. The only reason suggested why anything should have been paid by way of damages is that the contention had been raised by the lessors that the licence attached to the hotel had been jeopardized by the tenants' leaving the premises. This arrangement for the surrender of the premises was carried into effect by the execution of a Deed of Surrender, dated 23rd December, 1942. The rent under the lease was actually paid up to the 5th May, 1941, the date of the War Damage. Subsequently the undamaged part of the premises was requisitioned for the use of the British Sailors' Society, but I am satisfied that the rent which the lessors are accepting from the Society was not fixed on a purely commercial basis and is not to be regarded as a true measure of the letting value of the undamaged part of the hotel.

Under the provisions of section 7 (5) of the Finance Act, 1894, and section 60 (2) of the Finance (1909-10) Act, 1910, the principal value of any item of property for the purposes of estate duty is to be estimated to be the price which, in the opinion of the Ministry, such property would fetch if sold in the open market at the time of the death of the deceased. The Ministry, proceeding under these provisions, have valued Mr. Brand's interest in the lease of the hotel at "nil." They contend in the first place that the rent reserved by the lease is a fair rent which truly represents the letting value of the premises at the date of Mr. Brand's death, whereas, as I mentioned at the outset, the

petitioners contend that the rent was an excessive rent for the premises so that the lease really constituted a liability of the estate.

This difference between the petitioners and the Ministry at once gives rise to obvious questions of law. The first of these questions is this: Assuming that the rent was in fact an excessive rent and that the lease constituted a liability of the estate, are the petitioners entitled in law to claim that in calculating the principal value of the estate for the purpose of estate duty an allowance or deduction ought to be made on foot of such liability? This necessarily involves an examination of the statutes in order to ascertain on what basis, if any, such an allowance or deduction can be claimed under the statutes. Then, if it is determined that such an allowance or deduction is sanctioned by the Statutes, the further question arises as to what is the procedure by which in a disputed individual case it is to be decided whether any allowance or deduction ought to be made in the circumstances of that particular case and by which the amount of such allowance or deduction in the particular case is to be determined.

The general principle underlying the Acts relating to estate duty is that estate duty is to be charged according to the principal value of all property which passes upon the death of any person. And the duty has always been charged at graduated rates prescribed by the Acts, the more valuable a person's estate the higher being the rate of duty payable. A person's estate ordinarily consists of a number of separate items of property. The section of the Act of 1894 (section 7 (5)) which prescribes how principal value is to be ascertained does not prescribe a method of fixing the principal value of the estate as a whole. Instead of dealing with the estate as a whole it prescribes the method of ascertaining the value of any separate item of property which may form part of the estate. But when the Act comes to fix the graduated rates of duty it fixes them by a scale depending upon what it calls "the principal value of the *estate*." The original scale was prescribed by section 17 of the Act of 1894. The scale applicable in the case of Mr. Brand's estate is

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the scale set out in the First Schedule to the Finance (No. 2) Act (Northern Ireland), 1940. This scale uses the same phrase as section 17 of the Act of 1894 and relates the rate of duty to "the principal value of the "*estate.*"

Now, in the great majority of cases each separate item of property comprised in a person's estate will have some positive value, and in such circumstances the principal value of the *estate* will be the aggregate of the principal values of the separate items of property constituting the estate less the allowances and deductions for liabilities, etc., sanctioned by the Acts. But there are certain exceptional types of property of which a person may be possessed which may conceivably have no positive value but which may in ordinary parlance be described as having actually a minus value. Thus, as is alleged to be the position in the present case, a person may hold property under a non-beneficial lease subject to a rent which is in excess of the real value of the property. So far from having any positive value as an asset, such an item of property would constitute a liability of its owner's estate and the owner or his personal representatives would have to make a payment to the lessor or to a solvent assignee in order to be relieved of the burden of the property for the residue of the lease. Or again a person might be the holder of partly paid shares in a company whose financial position was thought to have deteriorated. The apprehension that a call of the unpaid capital might be imminent might render the position such that a sum of money would have to be paid by the shareholder in order to have the shares taken over by someone whom the directors would be satisfied to register as a transferee. If an item of property of one of these types happens to be included in a deceased's estate how is it to be dealt with in computing the principal value of the estate? Is an allowance or deduction to be made on foot of the minus value of such property? To refuse such an allowance or deduction would work an obvious injustice which in some cases might be a very serious injustice indeed. In construing Acts of Parliament—including Taxing

Acts—one approaches them with the idea that the legislature will not readily be presumed to have enacted a glaring injustice. Such instances of properties having a minus value must frequently occur. The estate duty has now been in force for half a century and if the Acts worked such an injustice as not to permit the taking into account of items having a minus value when calculating the principal value of deceased's estates one would imagine that a strong demand would have arisen for the amendment of the Acts. The only reported decision on the point to which I have been referred is the New Zealand case of *Re Inglis' Will* (1), in which it was held under legislation apparently similar to ours that the amount of the burden which an onerous leasehold imposed on a testator's estate should be assessed and should be allowed to be deducted from the *corpus* of the estate in order to ascertain the final balance of the estate upon which duty was payable. The matter does not appear to have been judicially considered in any reported case under the United Kingdom Acts but I observe that the text books take it for granted that where an item of property forming part of a deceased's estate has a minus value such minus value should be taken into account in computing the principal value of the estate. See, for example, *Dymond on Death Duties*, 8th Ed. p. 240 (shares), p. 248 (leaseholds); *Green on Death Duties* (1936) p. 206 (shares); *Soward on Estate Duty*, 7th Ed. p. 153 (leaseholds); *Webster Brown, Finance Acts*, 4th Ed. p. 157 (shares). And indeed in the present case the Estate Duty office in their memorandum of 14th August, 1942, conceded that deduction should be allowed in respect of the capitalised value of the liability (if any) of the deceased's estate in respect of the difference between the rent payable under the lease dated 23rd December, 1937, and the true rental value of the hotel at the date of the deceased's death, though as appears to me the Ministry by paragraphs 4 and 7 of their answer filed in the present case now seek to repudiate the only possible methods by which the Petitioners could have such deduction allowed or its amount computed.

(1) [1890] 8 N.Z.L.R. 28.

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One therefore approaches the Statutes in the expectation of finding that on their true construction a deduction is allowable on foot of items of property having a minus value when computing the principal value of a deceased's estate. But here I have to pause to consider the methods of appeal which are open to accountable persons who wish to challenge valuations of property fixed in Great Britain by the Commissioners of Inland Revenue or in Northern Ireland by the Ministry of Finance.

Under section 7 (5) of the Finance Act, 1894, and section 60 (2) of the Finance (1909-10) Act, 1910, the principal value of any item of property is to be fixed in the United Kingdom by the Commissioners and in Northern Ireland by the Ministry. Under section 10 (1) of the Act of 1894 a general right of appeal to the High Court was conferred on all persons aggrieved by values fixed by the Commissioners, and this is the right of appeal which the petitioners are seeking to pursue in the present case. But by section 60 (3) of the Act of 1910 it was enacted that the appeal to the Court under section 10 of the Act of 1894 should not lie where the question in dispute was a question of the value of any real (including leasehold) property, but that if any person was aggrieved by the decision of the Commissioners as to the value of any such property he might lodge an appeal which under section 33 of the Act of 1910 would be referred to one of the panel of referees appointed under Part I of that Act.

The initial point of difficulty which I have felt in this case is as to whether the question in dispute between the petitioners and the Ministry is not in reality a question of the value of the leasehold property, so that the method of appeal open to the petitioners is the appeal to be heard by a referee under the provisions of section 60 (3) of the Act of 1910 instead of the present appeal to the Court under section 10 (1) of the Act of 1894.

On examining the Acts of Parliament it seems to me that there are two possible lines of argument by which the petitioners could seek to support their contention that in determining the principal value of their testa-

tor's estate an allowance or deduction should be made in respect of the alleged minus value of his leasehold interest in the Imperial Hotel.

In the first place, I think they could contend that a separate item of property may well have a minus value, that there is nothing in the statutes to exclude the conception of an item having a minus value, and that in calculating the principal value of a deceased's estate there is nothing strained or unnatural in adding together the values of the items having a positive value and making appropriate deductions from this total in respect of items having a minus value. On the other hand, they could base their argument on the contention that the proper method of dealing with the matter in the present case is to regard the alleged minus value of the leasehold as constituting a debt or incumbrance for which an allowance falls to be made under the provisions of section 7 (1) of the Act of 1894.

Which of these two lines of argument is to be preferred? Giving the matter the best consideration which I can, I incline to the former as the preferable way in which to formulate the petitioners' claim. I do not see anything difficult or unnatural in the conception of an item of property having a minus value. Where the ownership of an item of property carries with it a liability exceeding in amount the value of the advantages attached to its ownership it seems to me quite natural to speak of it as having a minus value. The conception of property having a minus value is familiar on the Stock Exchange in regard to shares which are only partly paid up. And in the passages from *Green on Death Duties* and *Webster Brown on the Finance Acts* to which I have already referred, the authors find themselves speaking of the possibility of shares having a minus value. Unless the mind has first conceived the notion that every separate item of property must have a positive value I see no difficulty in holding that an item of property may have a minus value for the purposes of the Estate Duty Acts. The only argument which I have heard to the contrary is that "value" in the Acts must mean a value upon which duty can be assessed and that accordingly a

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value must be positive. The clear answer to this, however, is that duty is not assessed upon the separate individual items of property constituting an estate. It is assessed on the principal value of the deceased's *estate*, i.e., on the estate as an aggregate whole, and at a rate varying with the principal value of the *estate*. Where an estate consists of items having a positive value and other items having a minus value, it appears to me that the natural and simple way to ascertain the principal value of the *estate* is to add together the values of all the items having a positive value and to make the appropriate deductions for items having a minus value.

If I am correct in this view that a separate item of property may have a minus value for the purposes of the Estate Duty Acts, it follows that the question in dispute between the Ministry and the petitioners in relation to the testator's interest in the Imperial Hotel is simply a question as to the value of an item of leasehold property—whether its true value, as the Ministry contend, is "nil" or whether, as the petitioners claim, it is a minus amount. If this is the case, then the method of appeal which the petitioners ought to have adopted is the appeal in the manner prescribed by section 60 (3) of the Act of 1910.

The alternative ground upon which the petitioners could put their case—and the ground upon which they have in fact chosen to found it—is that the capitalised amount of the excess of the rent reserved by the lease over the rent at which it is alleged the hotel could have been let at the date of the testator's death is a debt or incumbrance for which they are entitled to have an allowance made by virtue of section 7 (1) of the Act of 1894.

Assuming for the moment that the rent reserved by the lease of the hotel was in excess of the economic rent, there would be no doubt that the testator's estate would be subject to a certain liability in the hands of his executors. But could this liability be properly termed a debt or incumbrance? It seems to me doubtful whether the liabilities attached to

types of property such as I have described as having minus values could strictly be described as debts or incumbrances. I do not think that anyone would ordinarily speak of the rent payable under a lease as an incumbrance. There is authority for the proposition that even the annuity payable to the Land Commission in respect of a holding purchased under the Irish Land Purchase Acts is not an incumbrance within the meaning of section 7 (1) of the Act of 1894 (*Inland Revenue Commissioners v. Cookman* (1)). And in *Whittaker v. Kershaw* (2) the English Court of Appeal held that the liability in respect of partly paid up shares before a call has been actually made is not properly described as a debt.

I notice that the applicability of this decision to section 7 (1) of the Act of 1894 is accepted in *Green on Death Duties*, p. 206, where it is said: "Liability in "respect of partly paid up shares is not a debt *per se*, "but only to the extent of an actual outstanding call. "If, however, the shares stand at a minus value, the "amount which it would be necessary to pay to get "them taken over by a transferee may be allowed, if "properly evidenced, whether there has been a call or "not." Accordingly it would seem to be doubtful if the provision in section 7 (1) of the Act of 1894 for allowance for debts and incumbrances can be relied upon as sufficient in all circumstances to provide for an allowance in respect of property having a minus value. On the other hand, it is right to say that in the case of *Wishart and others* (*Galletly's Trustees*) *v. Lord Advocate* (3)—a case arising out of the failure of the City of Glasgow Bank—it was considered by the Court of Session that for the purpose of Inventory Duty calls made on the executors after the death of a deceased shareholder were debts due and owing by the deceased under 5 & 6 Vict., c. 79, s. 23. This decision, however, was based on the wording of the Winding-Up provisions in the Companies Act, 1862. And in the New Zealand case of *Re Inglis' Will* (4), to which I have already referred, Williams, J., appar-

(1) [1915] 2 I.R. 149.
(2) 45 Ch.D. 320.
(3) 8 S.S.C. (4th Ser.) 74.
(4) [1890] 8 N.Z.L.R. 28.

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ently considered the negative value of the leasehold deductible because it was in the nature of a debt. The strongest way to put the contention perhaps is that the lease of 23rd December, 1937, contained a covenant by Mr. Brand to pay the rent and that accordingly his liability for future rent during the whole currency of the lease constituted a debt on his part. One difficulty, however, would seem to be that in this way of regarding the matter the amount of the debt would surely be the total amount of the entire rent payable under the lease, whereas the alleged debt for which the petitioners claim to be entitled to an allowance under section 7, so far from being the total amount of the entire rent payable under the lease, is merely the capitalised value of the difference between (*a*) the rent actually reserved by the lease and (*b*) what is said to be the proper rent which could have been obtained for the hotel by a letting made at the time of the testator's death.

No doubt the words " debts " and " incumbrances " in section 7 (1) of the Act of 1894 are to be given a wide meaning. And so, after pointing out the difficulties, I will assume for the moment that the petitioners' contention as to the applicability of section 7 (1) to the present case is well founded. Still this does not appear to me to get rid of the difficulty that the proper method of appeal is that prescribed by section 60 (3) of the Act of 1910. The object of section 60 (3) was to entrust the hearing of appeals regarding the value of landed property to a tribunal composed of persons having experience in the valuation of land (see section 34 of the Act). Under section 60 (3) where the question in dispute is a question of the value of any real (including leasehold) property the person aggrieved by the Commissioners' decision may appeal in manner prescribed by section 33 of the Act, but in such case no appeal is to lie to the Court under section 10 of the Act of 1894. What is the question in dispute in this case ? Look at it what way you will, the one question between the parties is as to the value of the property. All the evidence adduced by either side was as to the proper value to be affixed to a leasehold interest of the

Imperial Hotel for the residue of a term of 21 years from 1st December, 1937. Even if the petitioners' right to claim an allowance is founded upon the testator's liability being a debt or incumbrance under section 7 of the Act of 1894, yet the amount of that debt or incumbrance does not depend upon any matter in dispute between the parties other than their dispute as to the true value of the property. This is the only matter in dispute. I think it is a matter of the type intended to be covered by section 60 (3) of the Act of 1910, and in my opinion it is effectively covered by that section. If this view is correct, then the only appeal is as prescribed by the Act of 1910 and the present appeal brought under section 10 (1) of the Act of 1894 does not lie.

My conclusions accordingly are as follows :—

1. If the value of the testator's interest in the hotel at the time of his death was in fact a minus value, I am of opinion that the petitioners are entitled to claim an allowance in respect of this minus value when calculating the principal value of the testator's estate for the purpose of Estate Duty ;
2. I think the sounder ground upon which to base this conclusion is to recognize that a separate item of property may well have a minus value, and that the proper method of calculating the principal value of a testator's estate is to add together the values of the separate items of his property which have a positive value and to make appropriate deductions from this total in respect of such items as have a minus value ;
3. Whether the foregoing is the proper ground on which to base the petitioners' claim or whether it is more properly to be put on the basis that what I have called the minus value is a debt or incumbrance falling under section 7 of the Act of 1894, my view is that in either event the question in dispute between the petitioners and the Ministry is such that the decision of

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the Ministry can only be appealed against as directed by section 60 (3) of the Act of 1910.

It is true that the Ministry did not take this point at the hearing. And in fact by paragraph 7 of their answer they rather go out of their way to plead that there was no issue giving jurisdiction to a referee under section 60 (3), apparently seeking to refute a contention which, of course, the petitioners were not concerned to raise in the present appeal. But even though the point was not taken by the Ministry it must, if well founded, be taken by the Court as it is a point which goes to the Court's jurisdiction. I notice from the correspondence that this view of the proper method of appeal was taken by the petitioners' advisers in their letter of 13th May, 1943, and that on 27th August, 1943, they duly served a notice of appeal under section 60 (3) of the Act of 1910. I am glad to understand that this appeal is to be regarded as still pending.

As regards the present proceedings, they are merely an appeal under section 10 (1) of the Act of 1894, and accordingly it would appear to me that upon the conclusions at which I have arrived my only course is to dismiss the appeal. I cannot turn the proceedings into an action for a declaration upon the point of law which was at issue between the parties, viz., whether the petitioners are entitled to an allowance if it is found that the testator's interest in the hotel at the time of his death was in fact of a minus value. And I have been careful not to indicate any view at all on the question of value inasmuch as my decision is that under the Statutes this is a matter to be determined on appeal not by the Court but by the Referee.

Solicitors for the petitioners: *J. C. Taylor & Co.*
Solicitor for the respondents: *F. C. MacNeice.*

M. V. P.

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(Crown Side).

1944.
June 23, 30.
Nov. 13.

CROZIER v. MONTGOMERY:

Summary Jurisdiction—Indictable offence—Procedure—Summary Jurisdiction and Criminal Justice Act (N.I.), 1935, sec. 12, sub-secs. (1), (2)—Time limitation—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict., c. 93), section 10, par. 4—Applicability to indictable offences triable summarily.

By a Summons, dated 17th March, 1944, the defendant was charged with stealing certain articles of the value of £5 18*s.* 6*d.* on 24th and 27th January, 1943. At Petty Sessions the complainant having stated the facts which he proposed to prove the Court thought it expedient to deal summarily with the offence, and the defendant when informed by the Court of her right to be tried by a jury consented to be dealt with summarily. The defendant pleaded "not guilty." The Court, without hearing any evidence, dismissed the case on the ground that the prosecution was barred by sec. 10 of the Petty Sessions (Ireland) Act, 1851.

On a Case Stated as to (1) whether the case could be dealt with summarily before hearing the evidence of any witness, and (2) whether the limitation period of six months under section 10, paragraph 4, of the Petty Sessions (Ireland) Act, 1851, applies in the case of an indictable offence when dealt with summarily under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935,

Held (by Andrews, L.C.J., and Black, J.):—

1. That a magistrate is entitled to raise a question of law in a Case Stated pursuant to the provisions of the Summary Jurisdiction Act, 1857, for the opinion of a Superior Court although such question was not raised at Petty Sessions.
2. That the Summary Jurisdiction and Criminal Justice Act (N.I.), 1935, section 12 (1), confers a jurisdiction to deal summarily with certain indictable offences, and section 12 (2) prescribes the procedure to be adopted when the Court decides to exercise that jurisdiction.
3. That the time limitation in section 10, para. 4, of the Summary Jurisdiction Act, 1851, does not apply in the case of an indictable offence dealt with summarily under section 12 of the Summary Jurisdiction and Criminal Justice Act (N.I.). 1935.

CASE STATED pursuant to the Summary Jurisdiction Act, 1857 (20 & 21 Vict., c. 43), as amended by the

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Summary Jurisdiction and Criminal Justice Act (N.I.), 1935 (25 & 26 Geo. 5, c. 13).

The facts are stated in the judgment of Andrews, L.C.J.

MacDermott, A.-G., and *Phelan* for the complainant.

Campbell, K.C., and *Stewart* for the defendant.

Cur. adv. vult.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This case, which was stated by Mr. Long, R.M., arises out of a Summons, heard by the Resident Magistrate at Newtownards Petty Sessions, on 13th April, 1944, in which the complainant, Thomas Crozier, who is a District Inspector of the Royal Ulster Constabulary, charged the defendant with feloniously stealing, taking and carrying away certain articles, the property of one Catherine Maxwell, of the total value of £5 18*s.* 6*d.*, between 24th and 27th January, 1943. When the complainant had opened his case and stated the facts which he proposed to prove the learned Magistrate considered that, having regard to the nature of the offence, the absence of circumstances which would render it one of a grave or serious character, and the other circumstances of the case, including the adequacy of the punishment which he had power to inflict, it would be expedient to deal summarily with the offence. This view he stated in the presence of the parties, and he explained to the defendant her right to be tried by a jury. The defendant thereupon consented to be dealt with summarily, and pleaded not guilty.

The point was then taken by the defendant's solicitor that the summons, which was issued on 17th March, 1944, charged an offence which was alleged to have occurred more than six months before the date of the summons ; and it was submitted that the case was out of date and statute-barred having regard to the provisions of section 10, paragraph 4, of the Petty Sessions (Ireland) Act, 1851 (hereinafter referred to as "the Act of 1851"). In answer the complainant

submitted that this provision did not apply as the defendant was charged with an indictable offence; that it remained an "indictable offence" and was not a "case of summary jurisdiction" within the meaning of section 10, paragraph 4, referred to. The learned Magistrate held in favour of the defendant; and, without having heard any witness, he dismissed the complaint without prejudice.

In the foregoing circumstances our opinion has been sought on two points:—

(*a*) Was the learned Magistrate right in law in deciding to deal with the charge summarily before hearing the evidence of any witness?

(*b*) Was he right in law in holding that the limitation period of six months under paragraph 4 of section 10 of the Act of 1851 applied to an indictable offence when dealt with summarily under section 12 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (hereinafter referred to as "the Act of 1935")?

It is admitted that the first point was not raised or argued before the Magistrate; but our opinion was sought, at the instance of the learned Attorney-General (now MacDermott, J.) who regarded it as a matter of considerable importance. It was argued by Mr. Campbell, on behalf of the defendant, that a point not raised before the Magistrate could not now be raised before us, and in support of this contention he relied upon the judgment of Lord O'Brien, L.C.J., in *Perry v. Bowen* (1), at p. 38. That case does not appear to me to rule the present case. The only question of law which was there argued before the Magistrate was that there was no "dispute" between the parties within the meaning of the Employers and Workmen Act, 1875. Before the Court of King's Bench it was submitted, apparently on a suggestion first thrown out by the Bench, that the summons was defective in that it contained no averment of any dispute. The Court, on consideration of the matter, refused to entertain this submission; as, if

(1) 38 I.L.T.R. 37.

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the point had been made in the Court below, the magistrate in all probability would have made the necessary amendment, and so it could not have arisen for argument on the case stated. In such circumstances it would be manifestly unjust to consider and rule such an issue. In my opinion the present case falls more closely within the principle underlying the decisions of the Court of Queen's Bench in *Ex parte Markham* (1), and *Knight v. Halliwell* (2), that the Court will hear and determine questions of law arising on the facts stated by justices under 20 & 21 Vict., c. 43, section 6, although they were not taken before the justices or expressly reserved for the consideration of the Court. Indeed, the present case appears to me to be a much stronger one in favour of our right to determine the matter than either of the cases I have cited, as the Case, stated and signed by the Magistrate, comes before us with the question, no doubt at the instance of the learned Attorney-General, expressly raised and reserved for the opinion of this Court. In my opinion it is our duty to answer it.

Had, then, the Magistrate a right to decide to deal with the charge summarily before hearing the evidence of any witness ? The answer to this question depends upon the true construction of sub-sections 12 (1) and 12 (2) of the Act of 1935, and, in particular, upon whether these two sub-sections confer upon the court of summary jurisdiction two separate and independent jurisdictions for the summary disposal of charges of the character specifically mentioned in sub-section (1), or whether both sub-sections relate to one and the same jurisdiction. The magistrate took the former view, being obviously of opinion that, while the power conferred by sub-section (2) could only be exercised "at any time during the hearing," and after the court had become satisfied by "evidence" as therein mentioned, the power conferred by sub-section (1) was not so limited in either respect, and could, accordingly, be availed of on the opening statement of the complainant if the court thought it expedient, having regard to the matters therein mentioned, to

(1) 21 L.T. 748. (2) L.R. 9 Q.B. 412.

deal summarily with the offence. It is only fair to the magistrate to say that the view which he took is reasonably open upon the sub-sections, and that it accords with an established and most convenient practice ; for, if in each case—no matter how trivial—it be necessary for the magistrate to proceed with the hearing by the taking of depositions and following the other procedure prescribed where an accused party is being returned for trial, much public time will be needlessly wasted, and the discharge of the magistrate's duties will be made unnecessarily protracted and onerous.

These considerations have weighed with me, and—I do not conceal it—have made me strive to support the learned magistrate's opinion ; but I regret to say that I find that the weight of argument favours the contrary opinion, and I am forced to adopt the view suggested to me by my colleague, Black, J., and to which fuller expression will be given by him, that the two sub-sections do not relate to and confer separate jurisdictions, but that they are inter-related one to the other, the first alone conferring jurisdiction, whilst the second prescribes the procedure which must be followed when such jurisdiction is exercised. It is only by this construction that I find it possible to give full effect to the words in sub-section (1) which expressly make the court's power to deal summarily with the offence exercisable only "subject to the "provisions of this section"—words which obviously refer to sub-section (2). So also in sub-section (2) we have the provision that the court, on being satisfied with the sufficiency of the prescribed evidence, shall "for the purpose of proceedings under sub-section (1) "of this section" cause the charge to be reduced into writing. The words which I have inserted in inverted commas would in each case be inappropriate and, indeed, unmeaning if two separate jurisdictions were conferred.

I consider also that the opinion which I have expressed is supported by the historical aspect of the matter. The principle of summary disposal of small cases of the character specified, which was first intro-

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duced into our Summary Jurisdiction Code in Northern Ireland by the Act of 1935, had found earlier expression in section 12 of the English Summary Jurisdiction Act, 1879 (hereinafter referred to as "the Act of 1879"), the language of which, though not identical with the words of section 12 (1) and (2) of the Act of 1935, bears such a strong resemblance to these sub-sections as to indicate clearly that it constituted the original or, should I say, the more remote source from which these latter sub-sections were taken. It is not unimportant to note that the provisions of section 12 of the Act of 1879 were not embodied in two different sub-sections, but are to be found in two separate paragraphs of the one section, the second paragraph opening with the words "for the purpose "of a proceeding under this section." These words, especially having regard to the prominent position which they occupy, establish clearly the connection or the dependence of the one paragraph upon the other, the latter in fact providing the procedure for the former. Here was a jurisdiction which, by the express terms of the second paragraph, as it appears to me, could only be exercised "during the hearing of the "case" and after the court had been satisfied "by "the evidence" as to the expediency of dealing with the case summarily.

But, however this may be, we find that section 12 of the Act of 1879 was repealed by section 49 (4) of the Criminal Justice Act, 1925 (hereinafter referred to as "the Act of 1925"), and was replaced with corresponding provisions in two separate sub-sections (1) and (2) of section 24 of that Act. This latter section was obviously the direct source from which sub-sections 12 (1) and (2) of the Act of 1935 were taken; but the language of these two Acts of 1925 and 1935 once again differs. The provisions of section 24 of the Act of 1925 are somewhat more elaborate than those of section 12 of the Act of 1879; but for our present purposes it seems to me that the most important change which was effected was the omission from the Act of 1925 of the reference contained in the Act of 1879 to the necessity for "evidence." Such

a change must have been a very deliberate act, and it would scarcely have been made if there had been no necessity for it. There would have been no such necessity, however, if section 24 (1) constituted a separate jurisdiction exercisable without evidence, such as the magistrate held to exist in the present case under section 12 (1) of the Act of 1935. The conclusion seems irresistible—that sub-sections (1) and (2) of section 24 of the Act of 1925 related to one and the same jurisdiction.

It is at this point that I find my greatest difficulty in the case. How was it when the Act of 1935 was being passed by the Parliament of Northern Ireland, with its section 12 borrowed from the Act of 1925, that Parliament adopted a phraseology in sub-section (2) thereof which, whilst not requiring "evidence" to establish the expediency of dealing with the case summarily, expressly stipulates that before so dealing with it the court should become satisfied that "the "evidence is sufficient to put the person charged on "his trial for the offence"? By the use of these words, as it seems to me, the necessity for taking "evidence" before the jurisdiction can be exercised is preserved, though the evidence required is of a different character from that which was stipulated for in section 12 of the Act of 1879. It is, however, idle to speculate why this provision was inserted in the Act of 1935. The necessity is there—an unfortunate necessity, I agree, and one which might advantageously be removed by legislation; but—and this is the important point—the provision as to the necessity for such evidence in sub-section (2) and the absence of all reference to evidence in sub-section (1) cannot in my opinion transform what would otherwise be a single into a twofold jurisdiction. The whole matter is clarified, and the two sub-sections are made reconcilable one with the other, and consistent with the existence of a single jurisdiction when once the fundamental fact is appreciated that sub-section (2) is merely the machinery for carrying out the jurisdiction established by sub-section (1).

I now come to the last question in the case—

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whether the magistrate was right in law in holding that the limitation period of six months under paragraph 4 of section 10 of the Act of 1851 applied to an indictable offence when dealt with summarily under section 12 of the Act of 1935? Section 10 of the Act of 1851, so far as is material, provides that whenever a complaint shall be made to any justice as to any matter arising within the limits of his jurisdiction, upon which he shall have power to make a summary order, it shall be lawful for such justice to receive such complaint, and to proceed in respect of the same, subject to the provision (amongst others):— No. 4—that in all cases of summary jurisdiction the complaint shall be made . . . within six months from the time when the cause or complaint shall have arisen, but not otherwise. It will be observed that this section only applies when the complaint is such that the justice has power upon it "to make a summary "order," and when it is a "case of summary juris- "diction." Were these conditions complied with in the present case? One naturally approaches the question from the point of view that when the Act of 1851 was passed the Legislature could not have contemplated such a case as the present coming within the section, as no such power as that which is contained in the Act of 1935 to deal summarily with indictable offences then existed. In other words, section 10 of the Act of 1851, in speaking of "cases "of summary jurisdiction" was referring to cases where such jurisdiction was absolute, not where it was qualified or merely contingent upon obtaining consent. Throughout the Act one finds, as the learned Attorney-General put it, the antithesis between "cases "of summary jurisdiction" and "indictable offences"; and, clearly, if a case belonged to the latter class, it could not also belong to the former. In section 37 of the Act of 1851 we find an "order" defined in summary proceedings as the decision of the justices; and in section 44 "summary jurisdiction" is deemed to mean any case as to which a summary conviction or order may be made by a justice or justices out of petty sessions. If, as is apparent, at the time that

this Act was passed these terms could not have had any application to indictable offences, is there any evidence in the Act of 1935 that the Parliament of Northern Ireland intended that after the passing of that Act these terms should receive a wider meaning or a more enlarged interpretation than they had thitherto received, so as to include cases for indictable offences determined by a court of summary jurisdiction under section 12 of that Act? I can find none. On the contrary I find that in section 48 of that Act, by which a new and wider power was conferred upon a court of summary jurisdiction to award costs and witnesses' expenses in substitution for that contained in section 22, paragraph 9, of the Act of 1851, it was deemed necessary, in order to make this new power applicable to cases of indictable offences triable summarily, to include such cases within the term "cases of summary proceedings" by express reference and definition. The existence of such an inclusive definition for a limited purpose is in my opinion inconsistent with the submission of Mr. Campbell that cases of indictable offences triable summarily under section 12 of the Act of 1935 fall within section 10, paragraph 4, of the Act of 1851 as cases which are for all purposes "cases of summary jurisdiction."

I may add that the opinion which I have expressed accords with that which will be found in *Stone's Justices Manual*, 71st Edit., p. 73, on the corresponding English legislation. It is stated in that standard work, without any apparent doubt, but without, it is true, any citation of authority to support it, that the section (i.e., section 11 of the English Summary Jurisdiction Act, 1848), does not apply to indictable offences dealt with summarily.

For all these reasons I am of opinion that the learned Magistrate was wrong in holding that the case was statute-barred by the provisions of section 10, paragraph 4, of the Act of 1851. It was a case which the Magistrate thought on the material before him that it was "expedient to deal with summarily"; but that did not make it a "case of summary jurisdiction." In other words, it remains an indictable offence,

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though the Act of 1935 has authorised it to be dealt with summarily.

We shall, accordingly, refer the matter back to the Magistrate answering both questions submitted to us in the negative.

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As the case is one of considerable public importance, and as the legislation left the matter not wholly free from doubt, we shall allow no costs of the case stated or of the hearing before this Court.

BLACK, J.

BLACK, J. : The first question submitted in the Case Stated for the opinion of this Court is whether a Court of Summary Jurisdiction, acting under the power conferred by Section 12, sub-section (1), of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, is entitled to decide to deal summarily with an offence of one of the types specified in that sub-section before hearing the evidence of any witness.

It is admitted that this question was not raised at the hearing before the Resident Magistrate and that the learned Resident Magistrate before hearing any evidence decided without any objection on the part of the complainant to deal with the case summarily under the provisions of section 12 of the Act of 1935. It is accordingly urged that in such circumstances the Court ought not to deal with this first question.

It appears to me, however, that in acting as he did the Resident Magistrate must be taken to have impliedly decided that he was entitled before any evidence had been given to determine to proceed summarily with the case. Whether he was or was not entitled to do so is a pure question of law. Many instances could be cited of cases in which the Superior Courts upon the hearing of cases stated under the provisions of section 2 of the Summary Jurisdiction Act, 1857, have allowed points of law to be discussed which had not been raised or argued in the Courts below. In the present case I cannot see any valid reason why this Court should not consider and decide the point of law raised in this first question, especially as the learned Resident Magistrate has thought it

proper to submit it expressly for our decision. One can readily see that those concerned in the administration of justice in Courts of Summary Jurisdiction may find the point to be one of considerable importance and of almost everyday occurrence.

In support of the view that a Court of Summary Jurisdiction is entitled to decide to deal summarily with a case falling under the provisions of section 12 of the Act of 1935 before hearing any evidence, it is contended that sub-section (1) and sub-section (2) of section 12 confer two quite separate and distinct powers for the summary trial of indictable offences. It is said that sub-section (1) confers upon the Court of Summary Jurisdiction a power which can be exercised before any evidence is heard and that sub-section (2) confers a separate power exercisable during or after the hearing of evidence.

I cannot accept this contention. I find it quite impossible to extract from the provisions of the section any reason why the Legislature should have drawn such a distinction as that suggested. And the suggested construction appears to me quite opposed to the natural reading of sub-sections (1) and (2). In my opinion, the clear purpose of sub-section (1) is to confer a *jurisdiction* to deal summarily with certain indictable offences and the clear purpose of sub-section (2) is to prescribe *procedure* to be adopted when the Court decides to exercise that jurisdiction. So far from conferring a separate power quite independent of that conferred by sub-section (1), it seems to me that sub-section (2) is clearly ancillary to sub-section (1). To use the very words of sub-section (2), the sub-section provides what is to be done "for the purpose of "proceedings under sub-section (1)". If the two sub-sections created separate and independent powers it would be very odd to find one sub-section providing for what was to be done for the purpose of the other sub-section. And it would be still more peculiar to find that in sub-section (2) (the sub-section dealing with the case in which the power is conferred to adjudicate summarily after hearing evidence) the Legislature had considered it necessary to provide

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carefully for the questions to be put to the accused and the explanations to be given to him, whereas in sub-section (1) (in which it is suggested that a separate power to adjudicate summarily is conferred which is exercisable before any evidence is heard) the Legislature had not thought it proper to provide specifically for any precise questions or explanations to the person charged.

I am therefore clearly of opinion that sub-section (1) and sub-section (2) are not to be construed as conferring two separate powers but that they are to be read together as dealing with the same circumstances and the same subject matter, sub-section (1) dealing primarily with jurisdiction and sub-section (2) dealing primarily with procedure.

If this is the true construction of the sub-sections, then the Court of Summary Jurisdiction can only resort to the procedure which they prescribe—the reduction of the charge into writing and the reading of it to the accused and the addressing to him of the prescribed questions and explanations—in the circumstances mentioned in the sub-sections, namely when the Court becomes satisfied (*a*) that the evidence is sufficient to put the person charged on his trial for the said offence, and (*b*) that it is expedient to deal with the case summarily. Accordingly in my opinion the Court is not entitled to proceed summarily under section 12 of the Act of 1935 unless and until it has before it the evidence specified in sub-section (2) of section 12, namely, evidence sufficient to put the person charged on his trial.

It is perhaps worth while to refer to the position in England. Under section 12 of the Summary Jurisdiction Act, 1879, a power was conferred similar to that contained in sub-sections (1) and (2) of section 12 of our Act of 1935. Section 12 of the Act of 1879 was not, however, divided into sub-sections. It contained two paragraphs, the first paragraph, like our sub-section (1) of section 12 of the Act of 1935, conferring jurisdiction, and the second paragraph in terms not very dissimilar from sub-section (2) of our section 12 prescribing procedure "for the purpose of a pro-

"ceeding under this section." This second paragraph of the English section 12 provided for the procedure to be adopted by the Court "at any time during the "hearing of the case at which they become satisfied "by the evidence that it is expedient to deal with "the case summarily." Though so far as I have been able to discover, there is no reported case on the point, I gather that the opinion was held in England that the jurisdiction conferred by section 12 of the Act of 1879 could not be exercised before evidence had been heard. Section 12 of the Act of 1879 was repealed by the Criminal Justice Act, 1925, and replaced by section 24 of that Act. Section 24 of the Act of 1925 is divided into sub-sections, and sub-section (2) of this section 24 replaces the second paragraph of section 12 of the Act of 1879 but with one very significant difference. The words "at which they "become satisfied by the evidence" which appeared in section 12 of the Act of 1879 have been omitted from sub-section (2) of section 24 of the Act of 1925. One naturally infers that the omission was deliberate and that its object was to enable the Court to decide at any time after the commencement of the hearing of the charge (e.g., from the apparent trivial nature of the case or from the opening statement of the prosecutor), and even before going into evidence, that the case was one with which it was expedient to deal summarily.

Sub-section (2) of section 12 of the Northern Ireland Act of 1935 follows very closely the wording of sub-section (2) of section 24 of the English Act of 1925, but it differs from that sub-section in specifically requiring that the Court must be satisfied not only (*a*) that it is expedient to deal with the case summarily, but also (*b*) that the evidence is sufficient to put the person charged on his trial for the offence. In requiring that there must be evidence in order to entitle the Court to exercise its jurisdiction to proceed summarily, sub-section (2) of section 12 of the Act of 1935 accordingly differs from section 24 of the English Act of 1925 and resembles section 12 of the English Act of 1879. It differs, however, from section 12 of

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the English Act of 1879 in the following respect :— Under the Act of 1879 the point upon which the Court had to be satisfied by the evidence was that it was expedient to deal with the case summarily, but under our Act of 1935 the necessity for having evidence arises not from a requirement that the Court must have evidence to establish that the case is a suitable one to be dealt with summarily, but from a requirement that the Court, before deciding to proceed summarily, must have become satisfied that the evidence is sufficient to put the person charged on his trial.

I am not aware of the reason why, in adopting sub-section (2) of section 24 of the English Act of 1925, the Northern Ireland Legislature inserted the requirement that the Court must become satisfied that the evidence is sufficient to put the person charged on his trial. As at present advised, I cannot see that any good purpose is served by this requirement. It would be manifestly of the greatest convenience that Courts of Summary Jurisdiction should be entitled in suitable cases to exercise the jurisdiction conferred by section 12 of the Act of 1935 without the necessity of embarking first upon the hearing of evidence and the tedious task of taking depositions. If this view commends itself to the Legislature, I would respectfully suggest that section 12 should be amended, not merely by deleting the reference to evidence, but by the insertion of a few words dealing with the point specifically and making it quite clear that a Court of Summary Jurisdiction could exercise the jurisdiction conferred by section 12 at any time during the hearing of a charge, whether any evidence had been given or not.

But as section 12 stands at present I am of opinion that the first question submitted by the learned Resident Magistrate must be answered by declaring that he was not in law entitled to decide to deal with the charge summarily before hearing the evidence of any witnesses. In my judgment he was not entitled to proceed under section 12 until he had (in the words of the section) become satisfied that the evidence was sufficient to put the person charged on her trial.

The second question submitted in the Case Stated is whether the limitation period of six months under paragraph 4 of section 10 of the Petty Sessions (Ireland) Act, 1851, applies to an indictable offence when dealt with summarily under section 12 of the Act of 1935.

The framers of the Act of 1851 found that the proceedings before justices for which they were concerned to make provision were of two different types, namely (*a*) proceedings for indictable offences, and (*b*) summary proceedings. Apparently in 1851 these two types of proceedings were quite separate and distinct and mutually exclusive. Proceedings which belonged to one of the two classes could not possibly belong also to the other class. And the Act of 1851 accordingly proceeded to make separate and distinct provisions for these two different classes of proceedings. The Legislators of those days did not visualise that some day the problem would arise of determining how the provisions of their Act applied to a new type of proceedings which partook of the nature of both of the classes dealt with in the Act of 1851, namely, proceedings which were proceedings for indictable offences but which nevertheless might be dealt with summarily. Our present task is to attempt to determine whether the six months period of limitation prescribed for cases of summary jurisdiction by section 10 of the Act of 1851 applies to proceedings of this novel type. The main argument on the one side lays stress on the fact that paragraph 4 of section 10 professes to deal with all cases of summary jurisdiction, and that by section 44 the expression summary jurisdiction is to be deemed to mean any case as to which a summary conviction or order may be made by a justice or justices out of quarter sessions. It is accordingly urged that inasmuch as a magistrate dealing with a case under section 12 of the Act of 1935 can make a summary conviction or order, the case by virtue of the definition in section 44 of the Act of 1857 is to be deemed to be a case of summary jurisdiction, and that accordingly the limitation period prescribed by section 10 of that Act applies. The main argument on the other side is that the limitation period in section 10

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is annexed to the initiation of the proceedings, to the time of the making of the complaint, and that at this stage the proceedings are clearly proceedings for an indictable offence and have not yet been turned into proceedings in which the case will be dealt with summarily. I have most carefully considered the arguments which have been addressed to us, but I confess that I do not find any line of reasoning which clearly satisfies my mind in either direction. So far as I can see, the Act of 1851 gives no real guidance at all towards the solution of the difficulty. The fact is that the framers of that Act had not in mind the possibility of proceedings which were not only proceedings for indictable offences but were also proceedings which might be disposed of summarily, and had no thought of considering how the provisions of their Act would affect proceedings of such a type. Nor am I disposed to attach any great weight to the arguments which have been sought to be founded on the wording of such provisions as section 12 sub-section (5) and section 48 sub-section (2) of the Act of 1935. I am, of course, aware that it is assumed in England that the six months period of limitation prescribed by section 11 of the Summary Jurisdiction Act, 1848, does not apply to indictable offences dealt with summarily. But I gather that the argument in support of this view is founded upon the express provisions of section 27 of the Act of 1879. This latter section has not been reproduced in the Northern Ireland Act of 1935 and we are accordingly left without the measure of guidance which it affords.

Being unable then to find any determinate balance of argument in favour of either of the two opposing views what answer ought I to decide should be given to the second question submitted by the learned Resident Magistrate ? The ordinary and general rule is that no time limit is attached to the institution of criminal proceedings except in so far as a period of limitation may be prescribed by statute. If on a consideration of the statutes I find myself unable to pronounce positively that the time limitation in section 10 of the Act of 1851 applies to cases dealt

with under section 12 of the Act of 1935 it appears to follow that I cannot decide that such cases have been taken out of the general rule and that accordingly I must agree that the second question in the Case Stated should be answered in the negative.

Solicitor for the complainant : *Chief Crown Solicitor.*
Solicitor for the respondent : *Bernard Campbell.*

M. V. P.

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1943.

Nov. 30..
1944.
Mar. 31.

In re FLANIGAN AND McGARVEY AND THOMPSON'S CONTRACT.

Easement—Two tenements belonging to one owner—Sale of one of them—Implied reservation.

The owner of two adjoining houses one of which he held for the residue of a term of 989 years, sub-let that house on a quarterly tenancy; a path led from the county road over portion of the lands attached to the other house to the back door of the house so sub-let, and to no other place; the path was convenient but not essential for the enjoyment of the house; it was clearly visible to anyone viewing the premises. On a sale of the other house by the executors of the owner, under an agreement which did not mention the path, the vendors claimed that they were entitled to except and reserve from the conveyance to the purchaser of the house so sold, a right of way for the residue of the said term of 989 years over the path for the benefit of the house so sub-let.

Held, that the vendors were not entitled to except or reserve from the conveyance to the purchaser of the property sold any right of way over the path, but that they were entitled to have the conveyance so worded as to convey the property subject during the existing quarterly tenancy of the house so sub-let, and any statutory tenancy which might arise on the determination of that quarterly tenancy by virtue of the Rent and Mortgage Interest (Restrictions) Acts, to such right of way over the path as the tenant of that house, his executors administrators or assigns might be entitled to as an incident of his tenancy.

Wheeldon v. Burrows (1) and *Thomas v. Owen*, (2) considered.

Summons under the Vendor and Purchaser Act, 1874.

Warnock, K.C., and *Steele* for the purchaser.

Porter, K.C., and *McCorry* for the vendors.

The facts are stated in the judgment.

Black, J.

Black, J.: Under a Lease dated the 24th day of July, 1920, a Mr. Patrick Flanigan became the lessee for a term of 989 years of a plot of ground at Portadown, situated on the north-west side of the Armagh Road,

(1) 12 Ch.D. 31. (2) 20 Q.B.D. 225.

and having a frontage to the Armagh Road of 100 feet. This plot of ground is the portion coloured green on the map referred to in Mr. H. W. Thompson's affidavit and for convenience I shall refer to it as the green plot. On this plot of ground Mr. Flanigan erected in 1920 and 1921 a pair of semi-detached villas fronting to the Armagh Road. Of these two villas the one on the south-western side was from time to time occupied by tenants of Mr. Flanigan. It is at present occupied by a Mr. Henry Luther Bell and it will be convenient to refer to it as Bell's house. The two villas had a total frontage to the Armagh Road of about 68 feet. They are built on the north-east part of the green portion, and accordingly after their erection there was left—unbuilt upon—on the south-western side of Bell's house a part of the green plot having a frontage of about 32 feet to the road. Bell's house was provided with a back door for the usual purpose of taking in coal, etc., and taking out refuse and ashes. The natural means of access to this door from the road would be over the green plot along the side of Bell's house and it appears that immediately after the villas were erected a path about three feet wide was made from the road along by the gable wall of Bell's house to the back door of the house. The position of this path is shown and coloured blue on the map. I gather that at first this path was not fenced off in any way from the remainder of the portion of the green plot which had not been built upon.

The next stage in the history is that on the 18th May, 1923, Mr. Flanigan obtained a lease for a term of 990 years of a plot of ground coloured pink on the map, and having a frontage of 118 feet to the Armagh Road. This ground immediately adjoined the south-western boundary of the green plot and I shall refer to it as the pink plot. And on the 21st July, 1924, Mr. Flanigan obtained a lease for a term of 995 years of a plot of ground extending along the rear of the green plot and the pink plot and having a depth from front to rear of about 40 feet. This plot is coloured yellow in the map and I shall refer to it as the yellow plot. After obtaining these two leases Mr. Flanigan

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was in possession of a site comprising the pink portion, the yellow portion and the unbuilt-upon part of the green portion, and on this site he proceeded to build for himself a residence to which he gave the name of Aughavanagh. This house was erected in 1924 and 1925 and Mr. Flanigan went into occupation of it in July, 1925. Shortly after going into occupation of Aughavanagh Mr. Flanigan planted a laurel hedge along the edge of the path and erected gates and gate pillars at the road. The gates consist of a double gate opposite what appears to be the garage of Aughavanagh and alongside this double gate a small gate opposite the end of the path. Mr. Bell, who came into possession of his present house in July, 1931, says that the laurel hedge originally continued down to the gate pillars but that about 10 years ago an opening was made in it at the end next the road to allow an entrance to Aughavanagh without opening the large gate at the main entrance. At any rate for a considerable number of years the small gate has served both as an entrance to Aughavanagh and also to the path leading up to the back door of Bell's house. So far as Bell's house is concerned it was first occupied by a Mr. Geraghty. Then a Mr. Galbraith became tenant in November, 1924, and remained in occupation till May, 1930. Apparently the house lay vacant from May, 1930, to July, 1931, when Mr. Bell went into occupation as a tenant of Mr. Flanigan. Mr. Bell now holds from Mr. Flanigan's representatives who still retain the ownership of the house as a quarterly tenant and is apparently entitled to the protection afforded by the Rent and Mortgage Interest (Restrictions) Acts.

Mr. Flanigan died on the 29th April, 1942, and by an agreement in writing, dated 19th April, 1943, his executors, Mrs. May Flanigan and Mr. Patrick Joseph McGarvey, agreed to sell Aughavanagh to Mr. Herbert William Thompson for £2,500. At the time when this Agreement was prepared the title deeds seem to have been in the possession of a Building Society which had a mortgage on the property and in the Agreement the premises sold are described as "Firstly All that "Dwelling house and premises known as Aughavanagh

" . . . held under Lease, dated 18th day of May, 1923 . . . " and Secondly All that Garden and premises situate " at the rear of the premises hereinbefore Firstly " described being portion of the premises held under " Lease dated the 21st July, 1924." This description was inaccurate. As appears from the map part of the grounds of Aughavanagh was comprised in the Lease of 24th July, 1920, which is not mentioned at all in the Agreement ; and as regards the actual site of the house itself part of it is on ground comprised in the 1923 Lease part of it on ground comprised in the 1924 Lease and a small part is on ground comprised in the 1920 Lease. No point, however, is taken by the Purchaser in regard to these matters. The parties, however, are at difference in regard to the path on the south-western side of Bell's house. Whatever may be the rights in regard to this path as between the Vendors and the Purchaser there would appear to be little doubt but that Mr. Bell is entitled as an incident of his quarterly tenancy to use this path as a means of access to the back door of his house. In the absence of any arrangement under which Mr. Bell might agree to abandon this right he will continue to be entitled to use the path so long as his quarterly tenancy continues. And even if his tenancy is determined he will still continue to be entitled to use the path if and so long as he retains possession of the house as a statutory tenant under the provisions of s. 18 (1) of the Rent and Mortgage Interest (Restrictions) Act (N.I.), 1940. By letter of 27th July, 1943, the Vendor's solicitors sent to the Purchaser's solicitors the map which has been put in evidence and called attention to the path which they described as " a right of way coloured blue over the " premises to the rear of the adjoining premises " belonging to the deceased (Mr. Flanigan)." They suggested that the whole of the premises edged red on the map should be conveyed to the Purchaser reserving to the Vendors a right of way on foot and with barrows over and along the path. By their reply, dated 12th August, 1943, the Purchaser's solicitors refused to agree that the Vendors were entitled to have such a right of way reserved and they submitted

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for approval a draft Assignment making no mention of such a right. The Vendors' solicitors amended the draft Assignment by inserting a provision "Excepting "and reserving to the Vendors their and each of their "executors administrators and assigns and their "tenants and servants full right and liberty at all "times hereafter during the continuance of the said "term created by said Indenture of Lease of 24th "July, 1920, on foot and with hand barrows only to "go pass and repass along and over and upon the "passage three feet wide, coloured blue on the map "endorsed hereon and situate on the north-east side "of the premises hereby firstly assigned." The Purchaser's solicitors refused to accept this amendment and a correspondence ensued in which each side adhered to their own point of view. I could not help echoing the observation in the Vendors' solicitors' letter of 20th September, 1943, that it seems a pity that there should be any litigation over so small a matter and I deferred giving judgment in order to afford the parties an opportunity of arriving at an amicable arrangement which I understood might possibly be negotiated. I have been informed, however, that it has not been found possible to reach agreement and accordingly I have now to pronounce as best I can on what are the parties' legal rights in regard to the matter.

Mr. Porter's first contention on behalf of the Vendors was that not merely were they entitled to reserve a right of way over the path in dispute but that the path itself did not form part of the premises comprised in the contract of sale and that the Vendors were accordingly entitled to exclude it altogether from the conveyance to the Purchaser. His contention was that the path actually formed part of the premises which I have called Bell's house, and did not form part of the premises Aughavanagh which the Vendors had agreed to sell. It is somewhat remarkable that this contention was never put forward in the correspondence which passed between the solicitors nor is such a contention even hinted at in the affidavit filed on behalf of the Vendors in these proceedings. The

Vendors' solicitors who prepared the Agreement for sale never suggested that the path itself was not intended to be comprised in the premises agreed to be sold. In their letter of 10th August, 1943, written after the contest had arisen they speak of the path as separated by the laurel hedge from the *remainder* of the premises sold. The highest that they ever put the Vendors' claim is that the Vendors are entitled to reserve a right of way over the path. And the map prepared on behalf of the Vendors by their architect clearly shows the site of the path as included in the premises purchased by Mr. Thompson. I think that the conclusion to which this evidence clearly points is that the parties had no other idea but that the premises purchased by Mr. Thompson and described in the Agreement as the dwellinghouse and premises known as " Aughavanagh " extended up to the gable wall of Bell's house and included the site of the path ; and if it could by any possibility be maintained that the description of the premises in the actual written Agreement is not in accordance with this intention I think it would be difficult in the circumstances for the Vendors to resist a claim by the Purchaser for the rectification of the Agreement. Accordingly I proceed on the basis that the premises agreed to be sold to the Purchaser included the site of the path.

What then is the legal position on this basis ? As I have observed Mr. Bell appears to be entitled to a right of way over the path as an incident of his quarterly tenancy. That right being a right vested in a third party cannot be destroyed by any contract between the present Vendors and the present Purchaser. Accordingly if the Purchaser was coming before the Court seeking specific performance of his contract he could only obtain such specific performance subject to Mr. Bell's rights. On the other hand could the Vendors enforce specific performance against the Purchaser and compel him to accept a conveyance subject to Mr. Bell's rights over the path ? The Vendors claim that they could in view of the provision in Clause 10 of the Agreement that the premises are sold subject to rights of way. But I do not think that

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in the circumstances the Vendors are entitled to rely on the provisions of Clause 10. The Vendors must have been fully aware of Mr. Bell's rights over the path and it is well settled that such a Clause as Clause 10 does not absolve Vendors from their duty to disclose to the Purchaser all matters affecting the property which are within their knowledge. It is to be construed as applying only to matters of which the Vendors are not aware when they enter into the contract (*Heywood v. Mallalieu* (1), *Nottingham Patent Brick and Tile Co. v. Butler* (2) per Wills, J., per Lord Esher, M.R., *Simpson v. Gilley* (3), per Astbury, J.

On the other hand the Purchaser inspected the premises with some care before he entered into the contract. He must have seen the 3 foot wide path bounded by the gable wall of Bell's house on one side and by the laurel hedge on the other side and it must have been quite apparent to him that the purpose of the path, and its only purpose, was to afford a means of access to the back door of Bell's house. It is well settled that a purchaser of property must take it subject to any defects which are patent on inspection and are not inconsistent with the description contained in the contract for sale. The authorities for this proposition cited in the books are mostly old cases such as *Bowles v. Round* (4), which was approved in Ireland by Sugden, L.C., in *Martin v. Cotter* (5), at p. 506. But the existence of the principle that in the case of a patent defect the rule *caveat emptor* applies has been recognised in quite a number of modern cases, *Ashburner v. Sewell* (6); *Yandle v. Sutton* (7); *Simpson v. Gilley* (8). In order that a defect may be a patent defect within the meaning of this rule it is not enough that there exists on the land an object of sense that might put a careful purchaser on inquiry. To be a patent defect the defect must either be visible to the eye, or arise by necessary implication from something visible to the eye. In each of the three modern cases

(1) 25 Ch.D. 357.
(2) 15 Q.B.D. 261, 271; 16 Q.B.D. 778, 786-787.
(3) 92 L.J.Ch. 194, 201-202.
(4) 5 Ves. 508.
(5) 3 Jo. and Lat. 496.
(6) [1891] 3 Ch. 405.
(7) [1922] 2 Ch. 199.
(8) 92 L.J. Ch. 194.

to which I have just referred, while the existence of the rule was recognised, the defect was held not to be a patent defect, but a latent defect. In the present case, however, I think the defect is a patent defect. I think that the existence and the nature of the path, leading nowhere but to the back door of Bell's house, showed that it served no purpose other than as a way from the road to this back door to which there was no other means of access, and necessarily indicated as a practical certainty to anyone who saw it that the occupier of Bell's house would have a right of way over it to the back door of his house. Being therefore of opinion that Mr. Bell's right of way over the path during the currency of his tenancy is a patent defect, as that term is used in the authorities, I hold that the Purchaser is compellable to take the property subject to Mr. Bell's right and it would follow that the Vendors are entitled to have the conveyance of Aughavanagh expressed to be subject to this right.

On behalf of the Vendors it is contended, however, that not only must the Purchaser take the property subject to the right vested in Mr. Bell under his tenancy but that the Vendors are entitled to except and reserve from the conveyance of Aughavanagh a right of way over the path for the benefit of Bell's house not merely for the duration of Bell's tenancy but also for the whole of the residue of the 989 years Lease under which the green plot is held. The way that this contention is put is this. No doubt it is well settled by *Wheeldon v. Burrows* (1) that where the same person owns two adjoining tenements A and B, and has used a path over A for the more convenient occupation and enjoyment of B then if he sells and conveys tenement A to a purchaser he will *prima facie* not be entitled to contend that any reservation of a right of way over the path is to be implied for the benefit of tenement B which he retains. I need not refer to the subsequent cases in which this principle has been recognized and applied. A good illustrative case is *Taws v. Knowles* (2)—a decision of the English Court of Appeal. But it is said that there are certain recognized exceptions to this

(1) 12 Ch.D. 31. (2) [1891] 2 Q.B. 564.

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rule and it is alleged that this case falls under one or other of these exceptions. The exceptions particularly relied upon are (*a*) where the right sought to be reserved is a right of way of necessity, and (*b*) the exception supposed to be established by the case of *Thomas v. Owen* (1).

Now in the first place it may be a question whether these cases are really applicable to the circumstances of the present case at all. The point for consideration in all these cases was as to whether an exception or reservation was to be implied in completed conveyances. In the present case the point is not as to what implication should be drawn from a conveyance already completed but rather as to what precise form the conveyance when completed is to take. The matter here is still in contract. Our task is not to draw implications from a conveyance, but to find what wording of a conveyance will carry the parties' contract into effect. That there is a distinction between the two points—the construction of a completed conveyance and the form which a conveyance is to take in order to give effect to a contract—is brought out by Chitty, J., in *In re Peck and London School Board* (2), and by Astbury, J., in the recent case of *Simpson v. Gilley* (3), to which I have already referred. The distinction is not always emphasised in the text books. In discussing what reservations a Vendor of land is entitled in pursuance of his contract to have inserted in the conveyance the text book writers constantly refer to the cases decided on the reservations to be implied from completed conveyances. One infers from this that it is considered that the same implications are to be raised with regard to reservations in the Vendors' favour in contracts for the sale of land as in actual conveyances. This may indeed be the legal position. It appears to be borne out by the judgment of Chitty, J., in the case of *Beddington v. Atlee* (4). But in *Simpson v. Gilley* (3) Astbury, J. (at p. 200) after making reference to *Thomas v. Owen* (1), proceeded to dismiss such cases as irrelevant to the

(1) 20 Q.B.D. 225.
(2) [1893] 2 Ch. 315.
(3) 92 L.J.Ch. 194.
(4) 35 Ch.D. 317.

questions which he had to try, *videlicet* as to whether under the contract the Vendor was entitled to have a right of way reserved by the conveyance. He obviously considered that where there is a clear and unqualified contract for the absolute sale of a parcel of land without reference to any reservation for the Vendor's benefit it would require a good deal to persuade him that the Vendor could claim to have inserted in the conveyance a reservation of a right of way over the land sold. This appears to be in accordance with the view adopted in *Webster on Conditions of Sale*, 2nd Ed., at p. 8, where the learned author, not dealing at this point with completed conveyances but discussing Contracts for Sale under the heading of Particulars of Sale, sets out the legal position quite simply in these words: "If the Vendor intends to reserve any easements over "the land, or rights inconsistent with the full enjoy- "ment of the land, he must express his intention in "clear and explicit language.' It may possibly be that this broad statement should be subject to a qualification in cases where the right which the Vendor claims to have reserved is clearly essential to the enjoyment of the property retained (see *Dart on Vendors and Purchasers*, 7th Ed., Vol. I, p. 563). But if the statement even with this qualification is to be regarded as good law then it is clear that in the present case the Vendors would not be entitled to have inserted in the conveyance the reservation which they claim.

If, however, on the other hand the same rules in regard to the reservations to be implied from completed conveyances apply also to contracts we are driven to consider the exceptions upon which the Vendors here rely from the principle in regard to implied reservations laid down in *Wheeldon v. Burrows* (1). An undoubted exception—fully recognized in the judgment in *Wheeldon v. Burrows* (1) itself—is what are called easements of necessity; and it is said on behalf of the Vendors that the enjoyment of a right of access along the path by the occupier for the time being of Bell's house is an easement of necessity within the meaning

(1) 12 Ch.D. 31.

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of this exception. But it is well settled that an easement of necessity, as referred to in this exception, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property. (*Union Lighterage Co. v. London Graving Dock Co.* (1), per Stirling, L.J., at p. 573; *Greg v. Planque* (2), per Slesser, L.J., at p. 676). A right of access to the back door of Bell's house along the path may be very convenient and even almost necessary for the comfortable enjoyment of that house. But it cannot be pretended that it is essential and that without it the house could not be used at all. Accordingly I am clearly of opinion that in the circumstances of the present case the Vendors are not entitled to rely on this exception. Then in the alternative the Vendors claim that they are entitled to rely on the exception said to be established by the case of *Thomas v. Owen* (3). They say that inasmuch as Bell's house is in the occupation of a tenant who is entitled to a right of way over the path as against the Vendors during his tenancy the effect of *Thomas v. Owen* (3) is to entitle the Vendors by reason of the existence of this tenancy to secure a reservation of such right of way not merely for the duration of Bell's tenancy but for the duration of the whole of the long lease for which the Vendors hold the green plot. This would seem *prima facie* a very startling result to follow from the fact of Bell's house being in the occupation of a quarterly tenant. If Bell's house were vacant—as it apparently was from May, 1930, to July 1931,—or if it were in the personal occupation of the Vendors themselves then in view of the principle as regards implied reservations laid down in *Wheeldon v. Burrows* (4) no claim could be sustained upon the sale to the present Purchaser of a reservation to the Vendors of a right of way over the path. Can it possibly be that the mere fact of the house being in the occupation of a tenant under a short tenancy so completely reverses the legal position as to subject the Purchaser to the burden of such an

(1) [1902] 2 Ch. 557.
(2) [1936] 1 K.B. 669.
(3) 20 Q.B.D. 225.
(4) 12 Ch.D. 31.

easement during the whole residue of the 989 years Lease ? I have read and re-read *Thomas v. Owen* (1), and I think all the subsequent reported cases in which *Thomas v. Owen* (1) has been referred to in an earnest endeavour to see if I could formulate the precise principle upon which *Thomas v. Owen* (1) was decided and set the case in its proper place in a logical frame-work of exceptions to the principle which I have quoted from *Wheeldon v. Burrows* (2). I cannot profess to have succeeded. *Thomas v. Owen* (1) was undoubtedly a decision of a strong court. But subsequent Courts and text book writers have found obvious difficulty in enunciating a rule derived from *Thomas v. Owen* (1) which can stand logically with the undoubted authority of *Wheeldon v. Burrows* (2). Some tribunals no doubt have been able to accept *Thomas v. Owen* (1) without question. Thus in *Westwood v. Heywood* (3), Astbury J., at p. 139, finds himself able to speak of " the rule in *Thomas v. Owen*" (1). On the other hand a few years later in *Aldridge v. Wright* (4), Shearman, J., stated that *Thomas v. Owen* (1) and *Wheeldon v. Burrows* (2) obviously conflicted, and went on to say that in his opinion *Wheeldon v. Burrows* (2) and the cases which approve of it express the rule which ought to be applied in both the King's Bench and the Chancery Divisions, and in the same case Finlay, J., apparently takes the same view though he does not express it quite so bluntly. It is perhaps worth while to note as Shearman, J., points out in *Aldridge v. Wright* (4) that so far as appears from the reports *Wheeldon v. Burrows* (2) was not mentioned either in *Thomas v. Owen* (1) or in *Westwood v. Heywood* (3), though I can hardly think that the Court which decided *Thomas v. Owen* (1) had forgotten *Wheeldon v. Burrows* (2). Shearman, J.'s, criticism is so far as I know the most outspoken criticism of *Thomas v. Owen* (1) in subsequent cases, but it is impossible to read the judgments in other cases in which *Thomas v. Owen* (1) has been discussed without feeling that there is considerable difficulty in extracting

(1) 20 Q.B.D. 225.
(2) 12 Ch.D. 31.
(3) [1921] 2 Ch. 130.
(4) [1929] 1 K.B. 381.

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a clear principle from it which can be fitted in satisfactorily with the principle in regard to implied reservations established by the authoritative decisions in *Suffield v. Brown* (1) and *Wheeldon v. Burrows* (2). As regards the text books I cannot find either in the original edition of Halsbury's *Laws of England* or in the new Hailsham Edition any statement at all corresponding to what is said to be this rule established by *Thomas v. Owen* (3) and in Gale on *Easements*, 11th Ed., p. 199, the learned editors appear disposed to treat *Thomas v. Owen* (3) as resting on very special circumstances which are scarcely likely to occur again, which I suppose means that in their view it cannot be taken as laying down any principle. In two recent cases *Aldridge v. Wright* (4) and *Liddiard v. Waldron* (5), it appeared that the precise relationship between *Wheeldon v. Burrows* (2) and *Thomas v. Owen* (3) would arise for actual decision by the English Court of Appeal but unfortunately each case went off on the fact that it had not been satisfactorily established that the tenant was entitled as of right to the easement or quasi-easement which was alleged to be the subject matter of the reservation sought to be implied. In *Liddiard v. Waldron* (5), however, Lawrence, L.J., after referring at length to *Thomas v. Owen* (3), obviously feels pressed by the difficulty which I have mentioned of holding that the mere fact of the quasi-dominant tenement being let on a short tenancy so radically alters the normal position between Vendor and Purchaser as to endow the Vendor with a right in perpetuity or at any rate for the whole duration of his interest in the premises retained and says (at p. 445) that in his opinion the principle as applied in *Thomas v. Owen* (3) could not be held to govern a case where there is only a weekly tenancy of the quasi-dominant tenement. And I think that the same point may have been in Scrutton, L. J.'s, mind when he says (at p. 439): "I confess that the idea of a weekly "tenant wandering about with a series of easements

(1) 4 De. G. J. & S. 185.
(2) 12 Ch. D. 31.
(3) 20 Q.B.D. 225.
(4) [1929] 2 K.B. 117.
(5) [1934] 1 K.B. 435.

"when he can be got rid of by a week's notice is a "thing of which the law will not take much notice." If this alleged principle in *Thomas v. Owen* (1) cannot be held to apply where there is only a weekly tenancy I think that for exactly the same reason it cannot apply where there is only a quarterly tenancy so as impliedly to create an easement for the entire duration of a term of 989 years which on the basis of the principle in *Wheeldon v. Burrows* (2) would not have been implied at all if the landlord had been personally in occupation of the quasi-dominant tenement instead of having it let to a quarterly tenant. Accordingly even if the same principle as to implying reservations which applies to completed conveyances applies also to contracts I do not think that the legal position is such as to entitle the Vendors in the present case to sustain their claim to reserve an easement over the property sold for the whole residue of the 989 years term.

I will therefore declare that under the contract the Vendors are not entitled to except or reserve from the conveyance to the Purchaser of the property sold any right of way over or upon the passage three feet wide coloured blue on the map referred to in the Originating Summons; but that they are entitled if they so wish to have the Assignment to the Purchaser so worded as to convey the property subject during the existing quarterly tenancy of Bell's house and any statutory tenancy which may arise upon the determination of the said quarterly tenancy by virtue of the Rent and Mortgage Interest (Restrictions Acts), to such right of way over and along the said passage as the present tenant of Bell's house his executors administrators or assigns may be entitled to as an incident of the said quarterly tenancy. I say "if they so wish" for the Vendors are conveying as personal representatives and accordingly no covenant for title will be implied on their part except a covenant that they have not personally done anything to affect or incumber the property. If the parties were not at arm's length I take it they might be wishful to arrange that a

(1) 20 Q.B.D. 225. (2) 12 Ch.D. 31.

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reference to the right of a quarterly tenant of adjoining property might not be put on permanent record on the face of the Purchaser's muniments of title.

Solicitors for the Purchaser: *Carleton, Atkinson & Sloan.*

Solicitors for the Vendors: *Thomas J. O'Neill.*

M. V. P.

RUSSELL (INSPECTOR OF TAXES), APPELLANT; SCOTT, RESPONDENT.

H.L. 1945.

Feb. 6.

Income Tax—Sand Pit—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schedule A*, *No.* 3, *Rule* 3—"*Other concerns of the like nature.*"

APPEAL from an order of the Court of Appeal (1).

The House of Lords (Viscount Simon, L.C., Lord Russell of Killowen, Lord Macmillan, Lord Porter and Lord Simonds), discharged the orders of the Court of Appeal and the High Court, except as to costs, without pronouncing on the correctness or otherwise of the opinions therein stated, and directed that the assessments against which the Respondent appealed should be restored, but that the appeal against the assessments should be remitted to the Special Commissioners for them to re-hear, and, if so requested, to state a fresh case for the opinion of the High Court.

(1) [1944] N.I. 57.

C.A. 1944.

DIXON v. McALLISTER.

July 3, 4. Oct. 23.

Revenue—Customs—Prohibited Goods—Carrying for purpose of being exported—Removal with intent to evade prohibition of export—Knowledge of defendant that goods are prohibited goods—Customs Consolidation Act, 1876 (39 *&* 40 *Vict., c.* 39), *sec.* 186 *—Import Export and Customs Powers (Defence) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 69), *sec.* 3.

In proceedings brought by an officer of Customs the defendant was charged with (1) bringing to a certain place certain goods for the purpose of being exported in contravention of an Order made under the Import Export and Customs Powers (Defence) Act, 1939, (2) being knowingly concerned in removing certain goods, the export of which from the United Kingdom was prohibited, with intent to evade the prohibition, contrary to the Customs Consolidation Act, 1876, sec. 186.

Held, by the Court of Appeal:—

(1) That the prohibition of the bringing of any goods to a place for the purpose of being exported in contravention of an Order made under the Import Export and Customs Powers (Defence) Act, 1939, is an absolute prohibition, and that it was not necessary for the complainant to prove that the defendant knew that the goods were prohibited goods or that he knew their nature or quality.

(2) That in the proceedings under the Customs Consolidation Act, 1876, charging that the defendant had been knowingly concerned in removing prohibited goods with intent to evade the prohibition applicable thereto, the burden was on the complainant of proving that the defendant knew the nature or quality of the goods, or know that they were prohibited goods. *Emerson v. Woods* (1942), N.I., 118, followed.

CASE STATED by the County Court Judge of County Tyrone.

The facts are stated in the judgment.

MacDermott, A.-G., Fox, K.C., and *McVeigh* for the complainant.

Warnock, K.C., and *Conaghan* for the defendant.

Cur. adv. vult.

BABINGTON, L.J. : The judgment which I am about to deliver is the judgment of the Court.

This is an appeal by way of case stated. The respondent, one of His Majesty's Officers of Customs and Excise, instituted proceedings against the appellant and one Bernard Joseph Kelly by three Informations charging three separate offences under the Customs Laws in respect of the exportation or attempted exportation of 120 lbs. of turnip seed.

Three summonses, based on these informations, were served on the defendants alleging :—

(*a*) That the defendants brought the turnip seed to the Border for the purpose of being exported in contravention of an order made under The Import Export and Customs Powers (Defence) Act, 1939, and contrary to section 3 (1) of that Act, thereby incurring an additional penalty of £500.

(*b*) That the defendants were knowingly concerned in removing prohibited goods, to wit, the said turnip seed with intent to evade the prohibition applicable thereto contrary to section 186 of The Customs Consolidation Act, 1876, thereby incurring a penalty of £1,000 under that section and section 15 of the Finance Act, 1935.

(*c*) That the defendants exported the said turnip seed at a time other than the time prescribed by Regulation 9 of The Customs (Land Boundary) Regulations, 1933, and section 4 (2) of The Irish Free State (Consequential Provisions) Act, 1922, thereby incurring an additional penalty of £100.

The appellant, James McAllister (Junior), was convicted by the Resident Magistrate on all three charges and fined 2*s.* 6*d.* in respect of charge (*a*) ; £65 in respect of charge (*b*), and 2*s.* 6*d.* in respect of charge (*c*). He appealed against all three convictions to the County Court Judge for Tyrone, who affirmed the conviction on summons (*c*) in respect of the charge under The Land Boundary Regulations, and reversed the convictions upon summonses (*a*) and (*b*), but at the request of the complainant and respondent stated this case

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for our opinion as to whether he was right in dismissing either or both of these two charges.

The facts proved as to these two charges and found by the County Court Judge are as follows :—

On the 8th April, 1943, two constables of the Royal Ulster Constabulary in plain clothes were on customs duty near the land boundary between Northern Ireland and Eire in the townland of Garvaghey, County Tyrone, when about 8-45 p.m. they observed a stationary motor car which was slightly over the land boundary on the Eire side. As they walked towards the boundary a motor car in which James McAllister was a passenger travelled towards the boundary from the Northern Ireland side and stopped in Northern Ireland. It was then reversed into a lane or street in Northern Ireland and was thereupon lost to the view of the constables. It did not cross the land boundary into Eire. The driver of the car which was on the Eire side of the boundary then came into Northern Ireland and proceeded into the same lane or street, and as the police advanced towards the boundary the defendant, James McAllister (Junior), and the driver of the car which was in Eire emerged from the lane, the latter carrying a sack on his back. They crossed the boundary into Eire, and the driver placed the sack on the road immediately behind the luggage carrier of his car. McAllister then assisted him to put the sack on the luggage carrier by lifting one end of it. This was his first and only interference with the sack.

The constables crossed the boundary into Eire and asked the men to account for the sack. Each man said he knew nothing about it. It was a country sack, tied with string, and the police seized it and found inside 120 lbs. of turnip seed contained in several paper bags, the export of which was at all material times prohibited.

On the 9th day of April, 1943, McAllister was asked to furnish proof under section 3 (3) of The Import Export and Customs Powers (Defence) Act, 1939, as amended by Regulation 76A of The Defence (General) Regulations that the export of this seed was not un-

lawful by virtue either of an order under the Act or of the law relating to trading with the enemy, and made a statement which I will refer to later.

On this evidence it was submitted on behalf of McAllister that there could not be a conviction unless the prosecution proved that he knew the goods in the sack to be prohibited goods, and that there was no evidence that he knew this or was aware of the nature and quality of the goods.

The complainant contended that at least in respect of summons (*a*) brought under the Act of 1939, evidence of such knowledge was not necessary, and that the export of prohibited goods was an offence against that statute irrespective of the defendant's knowledge.

The County Court Judge held on both summonses that there was no evidence that the defendant knew the nature and quality of the contents of the sack prior to its being opened by the police, and that therefore there was no evidence that he knew the goods were prohibited goods, and accordingly he reversed the convictions of the Resident Magistrate on both summons (*a*) and summons (*b*) but reserved the following questions for the opinion of this Court :—

1. Whether I was correct in law in deciding that in proceedings for penalties (as distinct from proceedings for condemnation or forfeiture) for bringing goods to a place for the purpose of being exported in contravention of an order made under The Import Export and Customs Powers (Defence) Act, 1939, the prosecution must give evidence that a defendant knew the nature or quality of the goods in question or that he otherwise knew that the said goods were prohibited goods.
2. Whether I was correct in law in deciding that in proceedings for penalties (as distinct from proceedings for condemnation or forfeiture) for being knowingly concerned in removing prohibited goods contrary to section 186 of The Customs Consolidation Act, 1876, the prosecution must give evidence that a defendant knew the nature or quality of the goods in question, or

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that he otherwise knew that the said goods were prohibited goods.

The County Court Judge then says that he stated the questions in this form since—

(*a*) had he been satisfied on the facts that the defendant knew the nature or quality of the goods, or

(*b*) had he been satisfied that in law the prosecution need not give evidence of such knowledge on the part of the defendant he would have held that the prosecution had established a *prima facie* case, and that the onus of attempting to rebut such case had shifted to the defendant.

We take these questions and the County Court Judge's reasons for reserving them to mean that he was of the opinion—

1. that under both Acts the onus of proving that the defendant knew that the goods in the sack were prohibited goods was on the complainant, and

2. that he had failed to discharge this onus.

He says that he was not satisfied that the defendant knew the nature or quality of the goods or that he otherwise knew that the goods were prohibited goods, and he held that the proof required in support of both charges to be the same in this respect.

As to the charge preferred by summons (*a*) under the Act of 1939 (2 & 3 Geo. VI, Ch. 69) section 3 (1): "If "any goods . . . (*b*) are brought to any quay or other "place . . . for the purpose of being exported or of "being so carried . . . in contravention (either of an "order under this Act or of the law relating to trading "with the enemy) those goods shall be deemed to be "prohibited goods and shall be forfeited; and the "exporter of the goods or his agent . . . shall be liable "in addition to any other penalty under the enact-"ments relating to customs to a customs penalty "of five hundred pounds."

This provision prohibits the exportation of these goods absolutely, and as they were brought to the land boundary by James McAllister for the purpose of being exported (see the finding on summons (*c*)), the

offence charged under the Act of 1939 was proved and it was not necessary for the complainant to establish that the defendant knew that the goods were prohibited goods, or that he knew their nature and quality. The prohibition is absolute, the object being to stop the exportation of these goods, for the safety of the realm and the protection of its finances, and anyone found attempting to export them is liable to the penalty unless he can satisfactorily establish his want of knowledge or otherwise that his acts were innocent. "*Mens rea*" is presumed but it can be rebutted, and the onus of doing so is upon the defendant. In our opinion this is free from doubt upon the wording of the statute and the intention of the legislature to be gathered from its scope and objects.

Moreover the Act of 1939 is to be construed along with the Customs Consolidation Act, 1876, and the wording of section 186 of that Act, upon which summons (*b*) is based, namely, that the defendant was "*knowingly*" concerned in the removal of the goods is a clear indication that "*knowledge*" is not a necessary ingredient of the offence under the Act of 1939 from which the word "*knowingly*" has been omitted.

I will not refer at any length to the authorities.

In *Toppin v. Marcus* (1), at p. 426, Palles, C.B., commenting on *Sherras v. De Rutzen* (2), says:— "Where an act, not in any real sense criminal is in the "public interest prohibited under a penalty, the "innocent nature of the act is at least an element to "assist the Court in determining whether or not *mens* "*rea* is an essential ingredient." This element is present in this case, which is a revenue information and not a criminal cause or matter, (*Sherry*) *v. The County Court Judge and Chairman of Quarter Sessions for County Fermanagh* (3), and the objects of the statute would very often be defeated if a person found exporting goods could escape on the plea that the complainant has not proved that the defendant knew they were prohibited. Indeed, as Palles, C.B., says in

(1) [1908] 2 I.R. 423, 426.
(2) [1895] 1 Q.B. 918.
(3) [1935] N.I. 211.

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Toppin v. Marcus (1), at p. 428 :—"One of the "objects of the statute was to put an end to defences "of this class."

In *Sherras v. De Rutzen* (2), Wright, J., citing *Nichols v. Hall* (3), says, at p. 921 :—"There are many "cases on the subject, and it is not very easy to "reconcile them. There is a presumption that *mens* "*rea*, an evil intention, or a knowledge of the wrong- "fulness of the act, is an essential ingredient in every "offence ; but that presumption is liable to be dis- "placed either by the words of the statute creating "the offence or by the subject-matter with which it "deals, and both must be considered."

In *Cundy v. Le Cocq* (4), where the respondent was charged under the Licensing Act, 1872, for selling liquor to a drunken person who had given no indication of intoxication, it was held that the prohibition was absolute and that knowledge of the condition of the person served was not necessary to constitute the offence.

Brooks v. Mason (5), delivering liquor to a child under fourteen in a vessel not corked and sealed, was decided on the same grounds, and *R. v.* Edward *Fitzgerald, Duke of Leinster* (6), obtaining credit without disclosing that the debtor is an undischarged bankrupt contrary to section 155 of the Bankruptcy Act, 1914, and *A.-G. v. Lockwood* (7), a revenue prosecution for being in possession of prohibited goods, are to the same effect.

Regina v. Wm. Sleep (8) was decided the other way on the construction of the statute 9 & 10 Wm. III, C. 41, and *Frailey v. Charlton* (9) relied on by Mr. Warnock, is a decision under section 186 of the Act of 1876, which I will deal with later.

Mr. Warnock argued that the respondent could only be liable as exporter or agent of the exporter under section 3 (1) (*f*) of the Act of 1939, and that there was no evidence that he was either.

(1) [1908] 2 I.R. 423, 428.
(2) [1895] 1 Q.B. 918, 921.
(3) L.R. 8 C.P. 322.
(4) [1884] 13 Q.B.D 207.
(5) [1902] 2 K.B. 743.
(6) [1924] 1 K.B. 311.
(7) 9 M. & W. 378, 152 E.R. 160.
(8) Le. & Ca. 44, 169 E.R. 1296.
(9) [1920] 1 K.B. 147.

The County Court Judge, however, has held on summons (*c*) that he was guilty of the offence of exporting, or of having brought the hoods to the border to be exported, and has only reserved for this Court the question as to whether he did so with knowledge that the goods were prohibited goods, and as proof of this was not necessary to constitute the offence the answer to question 1 will be "*No.*"

The second question arises on an information laid under section 186 of the Customs Consolidation Act, 1876. In this case the complainant had to prove knowledge. The section itself says so, the summons assumes that the onus is on the complainant, and the decision in *Emerson v. Woods* (1) places the matter beyond doubt.

This is not, however, the only question arising on this case stated. If it were the answer to question 2 would be "Yes," but the Attorney-General has argued that on the facts found the complainant discharged the onus laid upon him by proving facts which established a *prima facie* case against the defendant of having brought the goods to the point of export and of having exported them knowing that they were prohibited goods.

This is a mixed question of fact and law, and the Attorney-General says that the facts have been found but that the County Court Judge has misdirected himself in law.

The case of the *Attorney-General v. Siddon* (2) is not a direct authority. In that case the prosecution charged the defendant with harbouring and concealing tobacco, the duty thereon not having been first paid. The acts were done by a servant without the knowledge or privity of the defendant, who was held liable notwithstanding upon proof of the fact that the tobacco was found on his premises.

Alexander, L.C.J., says, at p. 224:—"There was "no evidence to warrant the conviction upon that "count, (i.e., harbouring and concealing the tobacco) "except that the tobacco was found on the premises "of the defendant. It is an occurrence of every day to

(1) [1942] N.I. 118. (2) 1 C. & J. 220, 148 E.R. 1400.

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"convict upon such evidence, and if the rule were "otherwise, the laws would be completely inoperative. "It is always competent to the defendant to prove "his innocence if he can, but the finding is *prima facie* "evidence upon which these convictions proceed. If "he does not prove his innocence, the law presumes "his guilt from the fact of the goods being found "concealed upon his premises."

In *The Queen v. Prince* (1), Brett, J., at p. 162, says:—"The ultimate proof necessary to authorize a "conviction is not altered by the presence or absence "of the word '*knowingly*,' though by its presence or "absence the burden of proof is altered." If this be correct the burden of proof on summons (*a*) was on the defendant to show that he had no criminal mind once it was found that he brought the goods to the border for the purpose of being exported, while on summons (*b*) the onus was on the complainant to establish knowledge or a criminal mind.

"The presence of the word requires somewhat "more evidence on the part of the prosecution," Brett, J., at p. 161, but it does not call for irrefutable proof of knowledge. Such proof is generally impossible, knowledge being a state of mind not to be positively established in the absence of a statement by the defendant or unequivocal acts from which it may be inferred. But there are endless equivocal acts from which it can and must be presumed, and I think Alexander, L.C.J., had such acts in mind when in *Attorney-General v. Siddon* (2), he said "that the law presumes his guilt from the fact of the "goods being found concealed on his premises." I take him to mean by this that the harbouring and concealment of the tobacco on which duty had not been paid were themselves "*prima facie* evidence" upon which the conviction proceeded; or to put it in another way, were sufficient to raise a presumption of guilt from which the defendant must discharge himself if he can.

R. v. Gass (3) may have been correctly decided on the facts, but it lays down no general rule as to what

(1) L.R.2.C.C.R. 154.
(2) 1 C. & J. 220, 148 E.R. 1400.
(3) [1936] N.I. 144.

facts are sufficient to discharge the onus which is on the applicant under section 186; and in *Frailey v. Charlton* (1), the defendant discharged himself by establishing that he had no intention to evade the prohibition.

Now what were the facts proved in this case. The defendant comes to the border in a motor car. On the Eire side another car is waiting for him. The driver of that car comes across the border into Northern Ireland, and he and McAllister are seen emerging from a lane together and going towards the border, the driver of the Eire car carrying a sack on his back which McAllister assisted him to put on the luggage carrier of the car in Eire. The sack in fact contained 120 lbs of turnip seed, the export of which is prohibited.

These actions of McAllister are highly suspicious and without explanation might of themselves be sufficient to raise a presumption of guilt. No such explanation was given and on summons (*c*) the County Court Judge has found McAllister guilty on the charge of exporting this turnip seed, or bringing it to the Border for the purpose of being exported, and this conviction has not been challenged. Knowledge that the export was prohibited was not necessary to maintain that charge which was brought under regulations prescribing times of export, but the finding and conviction established that the defendant was concerned in removing goods from the United Kingdom, and these goods have been found to be prohibited goods. Was he a mere passenger innocently assisting the driver of the Eire car to load the seed on to his car? His acts, which by themselves might possibly have been innocent, assume quite a different aspect when contrasted with his statement which was put in evidence by the complainant and contained several contradictions of the facts found by the County Court Judge and several suppressions of the truth. He says:—

"On Thursday, 8th April, 1943, I accompanied "Bernard Joseph Kelly, Ballymena, in his car. "We were going to a fair in Donegal Town. A taxi "was to meet us at the Kearnhill-Garvagh Border

(1) [1920] 1 K.B. 147.

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"to take us to Donegal. We left our car in P. "Mcehan's street. I got out of the car and walked "up to the car which was waiting for us on the Eire "side of the border. Kelly remained at his car. "He did not walk up along with us. When I got "to the Eire taxi I saw a bag on the luggage carrier "of the Eire car. Soon after two policemen in "plain clothes came up to the car where I was "standing with the driver. As regards the bag "which was on the Eire taxi I know nothing about "it. I did not see it until I went to the car."

This statement, if true, proved that McAllister had no connection with this bag or knowledge of its contents, but it contradicts the findings of the County Court Judge that he accompanied the man who carried the sack across the border. McAllister as well as the police must have seen the sack before he crossed the Border, and he also denies this fact or that he helped to put it on the luggage carrier. The statement is therefore false.

He also suggests that the sack was never carried across the Border but was all the time on the luggage carrier in Eire, and that the Police evidence as to this and the man who carried it was false. This statement and the facts proved by the complainant, taken together, are strong evidence of guilty knowledge. If a person is found in the possession of stolen goods and tells lies to show that he was not in such possession, a judge would be bound to tell a jury that this is presumptive evidence that the accused knew that the goods were stolen; and as the issue here is precisely similar, the facts establish a *prima facie* case. But even if the County Court Judge was in doubt at the close of the complainant's case as to whether these facts, including the defendant's statement, established a *prima facie* case or not, we hold that they called for an answer because they were capable of being interpreted as evidence of guilty knowledge, and if the defendant wished to have an innocent construction placed upon them it was incumbent on him to give evidence in support of this contention. *R. v. Wm. Hampton* (1), per Lord Alverstone, L.C.J., at p. 276.

(1) 2 Cr. App. R. 274, 276.

In a case of this kind the Court, in considering the amount of evidence necessary to shift the burden of proof, must have regard to the opportunity of knowledge with respect to the facts to be proved which may be possessed by the parties respectively, Sankey, J., citing *Stephens Digest of the Laws of Evidence*, 9th Ed., Art. 96, in *Rex v. Kakelo* (1), at 795. And where the fact to be proved is guilty knowledge a very slender amount of evidence may be sufficient to shift the onus of proof since the truth or falsehood of the allegation lies peculiarly within the knowledge of the defendant. (See the judgment of Blackburn, J., in *Hibbs v. Ross* (2), at p. 543.

If the facts are capable of supporting an inference that the defendant's connection with the prohibited goods was not an innocent one, his failure to explain them may compel the Court to adopt the inference of guilt rather than that of innocence since the truth is known only to him, and it must be assumed that if he is innocent he will hasten to proclaim it and clear himself of the suspicion which the facts have fastened upon him.

Upon a criminal charge an accused may now give evidence in his own defence, Criminal Evidence Act (Northern Ireland), 1923, and the presiding judge may comment to the jury on his refusal to do so. *Reg. v. Rhodes* (3) which can only mean that the jury are entitled to view the evidence in the light of this refusal and if the facts are capable of an innocent explanation which is not given, to hold that they cannot be explained in any way consistent with innocence.

The question whether or not on the facts proved, and having regard to the failure of the defendant to give evidence, there was *prima facie* evidence of "knowledge" on his part, is one of law arising on the facts stated by the learned County Court Judge. It appears that this point was not argued before the County Court Judge, but we think it is necessary to decide it having regard to the erroneous view of

(1) [1923] 2 K.B. 793, 795.
(2) L.R. 1 Q.B. 534, 543.
(3) [1899] 1 Q.B. 77, 83.

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the evidence which we hold he has taken. This question of law is not one which if raised and argued before the County Court Judge could have been altered by evidence. Our decision is that a *prima facie* case was in fact established, and when the case again comes before the County Court Judge the defendant, if he decides to do so, can give evidence to meet it. *Kates v. Jeffery* (1), and *Folkstone Corporation v. Brockman* (2), in our judgment show that, on this question of law, necessarily arising on the facts found, we are not precluded by the form of the case stated from expressing our opinion.

The answer to question 2 will therefore be "*Yes*," with a rider that in the opinion of this Court a *prima facie* case was proved by the complainant.

Solicitor for the complainant: *Chief Crown Solicitor.*
Solicitors for the defendant: *Shields & Murnaghan.*

J. McC.

(1) [1914] 3 K.B. 160. (2) [1914] A.C. 338.

IN RE DUNDEE: Ch.D. 1944.

DUNDEE v. DUNDEE. July 31. Dec. 5.

Will—Construction—Devise to son—Gift over should devisee die without an heir.

The owner of a farm held in fee simple devised it to his son W., and the will then proceeded as follows :—"Should my son W. die "without an heir my farm shall go to my son J. or if my son J. "should predecease my son W. my farm is to go to his family."

Held that W. took an estate in fee simple in the farm subject to an executory limitation over to J. or his family if W. should die without an heir of his body.

ORIGINATING SUMMONS.

John Dundee was registered under the Local Registration of Title (Ireland) Act, 1891, as owner in fee simple of a certain farm. By his will, dated November 3, 1938, he gave and bequeathed his farm to his son William, and the will proceeded as follows :—"Should "my son William die without an heir my farm shall "go to my son John, or if my son John should pre- "decease my son William my farm is to go to his "family."

The testator died on January 31, 1940, and probate of the will was on April 26, 1944, granted to his sons, the plaintiff William Dundee, and the defendant John Dundee.

Gibson for the plaintiff.

Little for the defendant.

BLACK J. At the date of his will (3rd November, 1938), and at the date of his death (31st January, 1940), John Dundee was the owner of a farm which consisted of the lands comprised in Folios Nos. 6186 and 6187 of the Register of Freeholders for County Antrim, and was registered on the said Folios as owner in fee simple of the said lands. Although the lands BLACK, J.

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are subject to the provisions of Part IV of the Local Registration of Title (Ireland) Act, 1891, yet they undoubtedly remain real estate and all the rules of law or construction applicable to the will of a testator dealing with real estate apply to a devise of such lands save in so far as those rules have been altered or modified by the provisions of Part IV of the Act. Consequently it is to be borne in mind in approaching the disposition of his farm contained in John Dundee's will that this disposition is a devise of real estate and falls to be construed as such. There was nothing, for example, to preclude the testator, if he so wished, from creating an estate tail in the lands by the use of appropriate words in his will. *Longworth v. Campbell* (1), approved by the Court of Appeal in *Farrelly v. Farrelly* (2).

The devise in John Dundee's will which we have to construe is as follows :—

"I give and bequeath . . . to my son William "my farm of land . . .

"Should my son William die without an heir my "farm shall go to my son John or if my son John "should predecease my son William my farm is to "go to his family."

On the one hand it is contended that this devise confers on the son William either an absolute estate in fee simple or else an estate tail. On the other hand it is contended that the devise confers on William an estate in fee simple subject to a contingent executory limitation over in favour of John or his family in the event of the death of William without leaving any issue surviving him.

Now in the first place there can be no doubt that by virtue of Section 28 of the Wills Act, 1837, the words "I give and bequeath . . . to my son William "my farm of land" are adequate to pass the testator's fee simple interest in the lands unless there is something further in the will showing a contrary intention.

In the second place, the limitation over in the event of William dying without an heir is to William's brother John or, if John should predecease William, then to

(1) [1910] 1 I.R. 23. (2) [1918] 1 I.R. 488.

John's family. This limitation contemplates the possibility of William dying without an heir and yet being survived by his brother John who would, of course, be a collateral heir of William. It is well settled that in such circumstances the word "heir" cannot mean heir in general but must be read and construed as meaning "heir of the body." *Kirkpatrick v. King* (1), *In re Waugh* (2), *In re Conboy's Estate* (3), *In re Thomas* (4). Accordingly, the will is to be read as if it were worded: "I give and bequeath to my son "William my farm of land. Should my son William "die without an heir of his body my farm shall go to "my son John, or if my son John should predecease "my son William my farm is to go to his family."

In the third place, it is clear from the authorities that the construction of a devise so worded is not affected by the provisions of Section 29 of the Wills Act, 1837. That section applies only to expressions denoting a want or failure of *issue* and does not extend to cases in which the words used are "die without "heirs" or "die without heirs of the body." *In re Sallery* (5), *Dawson v. Small* (6), *Kirkpatrick v. King* (1), *In re Conboy's Estate* (3). Accordingly such an expression as that in the present will "die without an "heir," or, as I hold it must be read "die without an "heir of the body," falls to be construed without reference to section 29 of the Wills Act.

How then should such an expression be construed according to our law? I think that there can be little doubt on this point. After a devise of real property to A. such an expression as "should A. die "without an heir of his body" will be read as *prima facie* importing an indefinite failure of heirs of the body at any time, however remote, unless the context of the will shows an intention to the contrary. If no intention to the contrary is to be drawn from the will, then the devise will be construed as a devise of an estate tail to A. If, however, an intention to the contrary appears from the will—if, for example, it is

(1) 32 I.L.T.R. 41.
(2) [1903] 1 Ch. 744.
(3) [1916] 1 I.R. 51.
(4) [1920] 1 Ch. 515.
(5) 11 Ir. Ch. R. 236.
(6) L.R. 9 Ch. 651.

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evident from the wording of the will that the testator was dealing not with the event of an indefinite failure of heirs of the body at any time but with a failure of heirs of the body at the death of A.—then the devise may be construed as a devise in fee simple to A. with a contingent executory limitation over upon the failure of heirs of the body at the time of the death of A. The question, accordingly, to be determined in each case is whether on the true construction of the will there is sufficient to indicate that the testator was contemplating a failure of heirs of the body at the death of the first taker and intended that the death of the first taker was the point of time at which the gift over was to take effect, if at all, or whether on the other hand there is no sufficient indication of this so that the limitation over will be regarded as being capable of taking effect on a failure of heirs of the body however remote. In the former case the devise may, as I have said, be construed as a devise in fee simple subject to a possible executory limitation over on the first taker's death: in the latter case it will be construed as a devise of an estate tail. The two types of case will be found clearly indicated and distinguished in the speeches in the House of Lords in the Irish case of *Coltsmann v. Coltsmann* (1).

Two modern cases may be referred to as affording useful illustrations of the principle.

The first is *In re Conboy's Estate* (2). In that case the testator devised to his son George Robert Conboy his interest in the lands of Shancough and continued, "I also will and direct that in the event of my said "son George Robert Conboy having no heir or issue "the said lands of Shancough herein devised to him "shall in such case go to the eldest son of Thomas "Henry Conboy after the death of George Robert "Conboy." Wylie J. after holding that "heir" must be construed as meaning heir of the body, and assuming that section 29 of the Wills Act did not apply, found in these last words "after the death of "George Robert Conboy" an indication that the death of George Robert Conboy was the point of time

(1) L.R. 3 H.L. 121. (2) [1916] 1 I.R. 51.

at which the testator intended that the limitation over should take effect. At p. 56 he says: "I think "it is clear from the words 'after the death of George' "that he intended each gift over to take effect—if it "took effect at all—at the death of the devisee. . . . "Therefore it seems to me that in order to give effect "to all the words used, this will must receive the same "construction as would be put upon a devise to A. in "fee simple, but in the event of his having no heir "of his body or issue *at his death* then over to B. in fee, "and I think there can be no question that under a "devise in these terms A. would according to the law "prior to the Wills Act have taken an estate in fee "simple subject to a contingent executory devise "over on his death and not an estate tail."

The other case is *In re Thomas* (1). In that case the testator devised certain lands to the Honourable Walter Vivian "and at his death without an heir to "Captain Anthony Vivian and his heirs." Eve J. after construing the word "heir" as meaning "heir "of the body," relied on the words "at his death" as indicating that the death of the Honourable Walter Vivian was the point of time at which the testator intended the limitation over to take effect. At p. 519 he says, "The real question to be decided comes therefore "to this, Is this gift over to be construed as taking "effect on an indefinite failure of heirs of the body "of the first devisee or on a failure of heirs of the body "at the time of the death of the first devisee? If an "indefinite failure of heirs of the body is contemplated, "then the first taker's interest must be construed as "an estate tail; but if the failure of heirs of the "body contemplated is a want or failure at the date "of the death of the first devisee the estate in fee is "not converted by the subsequent limitation into an "estate tail. I have here the words 'at his death "'without an heir' and I think the words 'at his "'death' point to a *punctum temporis* at which it "is to be ascertained once for all whether the con-"tingency has happened on which the gift over is to "take effect. The estate is not given over on an

(1) [1920] 1 Ch. 515.

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"indefinite failure of heirs of the body but only if "there is no heir of the body at the time of the first "taker's death. There is therefore no ground for "cutting down the interest of the first devisee to an "estate tail. Applying *Parker v. Birks* (1), and "greatly assisted by the reasoning of Joyce J. in "*In re Leach* (2), I hold that on the true construction "of this will the plaintiff takes an estate in fee subject "to an executory devise over on his death if he should "die without an heir of the body."

Applying these principles to the construction of the present will, the question we have to ask is whether there is anything in the will which shows that the testator intended that the gift over—if it took effect at all—should take effect at the death of the first taker. I think we get a good indication of the testator's intention from the gift over itself. Under the gift over the testator's son John is to take if he is alive at the death of his brother William, the first taker. If John is not then alive the farm is to go to John's family. To my mind the fact that the testator has made the decision of the question whether John is or is not to get the farm depend on whether he is alive at the death of the first taker is a pretty clear indication that the death of the first taker was the time when the testator contemplated that the gift over should take effect if it took effect at all. I therefore hold that on the true construction of the will the testator intended the gift over to take effect only on the failure of heirs of William's body at the death of William and not on an indefinite failure of such heirs.

It remains to consider an argument which was put forward on behalf of William Dundee that the devise in his father's will conferred on him an estate in fee simple absolute so that the gift over to John or his family was of no effect. This argument was based upon such cases as *Kirkpatrick v. King* (3), and *In re Ball* (4). In both of those cases, however, the farm which was the subject matter of the disposition in the will was of chattel tenure. In each case upon the wording of the will the limitation over could take effect upon

(1) 1 K. & J. 156.
(2) [1912] 2 Ch. 422.
(3) 32 I.L.T.R. 41.
[1933] N.I. 173.
(4)

a failure at any time of heirs of the body of the first taker. There was nothing in either will to indicate that the operation of the limitation over was to be restricted to a failure of heirs of the body occurring at the death of the first taker. Accordingly, if the property had been realty the disposition would have been construed as a devise of an estate tail to the first taker. A disposition, however, which is construed as effective to create an estate tail in realty will be construed as conferring an absolute interest in personalty. It followed that in each case as the farm was of chattel tenure the will was construed as vesting an absolute interest in the first taker and that the attempted gift over on an indefinite failure of heirs of the body was void. In *Kirkpatrick v. King* (1) it is explicitly stated that the farm was held under a chattel tenure. As regards *In re Ball* (2) I cannot find in the report of the case any clear statement as to what was the tenure of the farm at the crucial date, the date of the testator's death in 1895. At p. 176 counsel is reported as stating that the land was registered and devolved as personalty. At p. 179 at the beginning of his judgment Megaw J. says that the farm, he was told, was held by a tenure under which it had to be dealt with as personal property. Later on the same page he says that there was no real estate to be dealt with, and near the end of p. 181 he categorically states that the property was personal. No one was more familiar than Megaw J. with the position in regard to registered land as explained in *Longworth v. Campbell* (3) and *Farrelly v. Farrelly* (4), and the only basis as far as I can see on which the statements in the report of *In re Ball* (2) can be reconciled is that the farm was held under a chattel tenure at the date of the testator's death in 1895 but that the fee simple had been purchased under the provisions of the Land Purchase Acts and the land registered under the Local Registration of Title Act at some time subsequent to his death. If this was the state of affairs, then the disposition in the will was a disposition of personalty only. At any rate Megaw

(1) 32 I.L.T.R. 41.
(2) [1933] N.I. 173.
(3) [1910] 1 I.R. 23.
(4) [1918] 1 I.R. 488.

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J. treated it as such and his decision is to be regarded as a decision as to the effect of a disposition of personalty. On this basis it is entirely in accord with the decision of the Court of Appeal in *Kirkpatrick v. King* (1). The present case is to be distinguished from *Kirkpatrick v. King* (1) and *In re Ball* (2), not only because it is concerned with a devise of realty and not a bequest of personalty, but also (which is the more important distinction) because John Dundee's will in my view contains sufficient to indicate that the testator intended that the gift over should take effect only upon a failure of heirs of the body at the death of the first taker and not upon an indefinite failure of such heirs, whereas no such indication was to be found in the wording of the wills considered in *Kirkpatrick v. King* (1) and *In re Ball* (2).

The questions submitted in the summons must accordingly be answered by declaring that on the true construction of John Dundee's will his son William takes not an estate tail but an estate in fee simple subject to an executory limitation over on his death if he shall die without an heir of his body. The words "die without an heir" must, of course, mean die without *leaving* an heir of the body. A man cannot have an heir during his lifetime. *Nemo est haeres viventis.* Accordingly, the death of William is the time at which it must be ascertained whether he has an heir or not. On this point I respectfully agree with Wylie, J.'s judgment in *In re Conboy's Estate* (3). Even if the words had been "die without a child or "children" there is authority for the proposition that they would be construed as die without *leaving* a child or children *In re Booth* (4). But when the words are "die without an heir" or "die without an "heir of the body" I think the position is quite clear.

Before leaving the case I think it right to point out that I have not adverted either to (*a*) the precise meaning to be given to the words "his family" in the gift over in John Dundee's will, or (*b*) the possible effect of section 10 of the Conveyancing Act, 1882. Quite

(1) 32 I.L.T.R. 41.
(2) [1933] N.I. 173.
(3) [1916] 1 I.R. 51.
(4) [1900] 1 Ch. 768.

apart from the fact that these points are not raised in the summons and that all the parties between whom they may have to be discussed are not before the Court, I think that they are points which it would be premature to deal with at the present time. Possibly indeed they may never arise for decision. But it is well that the parties' advisers should have them in mind.

Solicitors for the plaintiff: *John G. H. Wilson & Co.*
Solicitors for the defendant: *Robert Kelly & Son.*

M. V. P.

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CAMPBELL v. JOHN KELLY LIMITED.

Nov. 20, 21. Dec. 14.

Negligence—Contributory Negligence—Cause of injury.

As a person was posting a letter it was blown on to the public street, and a boy ran off the footpath on to the carriageway to recover it, without looking to see if any vehicle was approaching; he picked up the letter and immediately after doing so he was struck by a motor lorry driven by the servant of the defendants and was killed: the distance from the place where he left the footpath to the place where he was struck was at least 30 feet: at the time of the accident there was clear daylight, and there was nothing to obstruct the boy's view of the lorry, or the lorry driver's view of the boy. In an action brought by the boy's father and personal representative for damages for negligence in the driving of the lorry, the judge who tried the case held that the boy was guilty of negligence in leaving the footpath and running on the carriageway as he did, and that the driver of the lorry was not guilty of any negligence and could not have avoided the accident, and he dismissed the case.

On a motion by the plaintiff for a new trial of the action the Court of Appeal (Black J. dissenting), found on the evidence that the driver of the lorry and the deceased boy were both guilty of negligence, and that the driver of the lorry could by the exercise of reasonable care have avoided the accident, but

Held, that it was also necessary to determine whether the deceased boy by the exercise of reasonable care could have avoided the accident, and that if the boy could have thus avoided the accident, the action must be dismissed on that ground.

The questions to be submitted to the jury in actions for negligence when the injured person and the defendant were both guilty of negligence, considered.

MOTION for new trial of an action brought under the Fatal Accident Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, claiming damages for negligence in the driving of a motor lorry.

The facts are stated in the judgment of Andrews, L.C.J.

McSparran and *Stewart* for the plaintiff.

Fox., K.C., and *Copeland*, for the defendants.

ANDREWS, L.C.J. : In this action the plaintiff, who is the father and administrator of one Thomas Campbell, sought damages under the Fatal Accidents Acts and the Law Reform Act (Northern Ireland), 1937, for the alleged negligence of the defendants in the driving, control and management of a motor lorry on 20th December last. The lorry was the property of the defendants, John Kelly Ltd., and was driven on the occasion referred to by their servant. The accident occurred at the junction of the Oldpark Road with the Crumlin Road, these roads converging at an angle of about 20° to 25°. Both roads are important and busy thoroughfares. A student in Queen's University named Larmour was proceeding on his bicycle to post some letters in the pillar box situate on the footpath close to the kerb opposite to the Oldpark Road Post Office, when one of them, apparently after he had dismounted, blew out of his hand on to the road in the direction of the point where the tram rails of the two roads meet. The hour was approximately 12-30 p.m. ; and there is no evidence to suggest that either weather or any other condition interfered with normal mid-day December visibility. Thomas Campbell, a young man of 17 years, was on the footpath a few yards away from the pillar box. Seeing what had occurred he left the footpath in pursuit of the letter. The point at which he left is not precisely defined in the evidence ; neither is there an agreement in the evidence as to the rate of speed at which he proceeded ; but in my opinion the whole weight of the evidence, quite apart from the probabilities of the case, favours the view that, acting on the sudden impulse of the moment, he ran after the letter taking no precautions for his own safety, and had reached the point where the tram lines meet—probably some 40 feet away from where he started—when, having apparently picked up the letter (one witness, indeed, says he had picked it up twice), the defendants' lorry ran into him and knocked him down, death resulting soon afterwards.

The action was tried by Babington, L.J., without a jury on 5th July last when he found for the defendants. The certificate is silent as to the findings of fact on

C.A. 1944.

CAMPBELL v. JOHN KELLY LIMITED.

ANDREWS, L.C.J.

which his decision was based; but these are supplied by the learned Lord Justice's notes and report upon the case. He held as a fact on the evidence, and his finding has not been and could not be challenged, that the deceased ran out to retrieve the letter, without taking the precaution of seeing that the road was clear of traffic, and that he was negligent in so doing. This the Lord Justice regarded as the sole cause of the accident. He further held that the driver of the lorry could not have avoided the accident; that he was keeping a proper lookout, and saw the deceased as soon as he could reasonably have been expected to do so; that he also pulled up promptly and, accordingly, was not guilty of any negligence.

I respectfully accept this finding so far as it relates to the prompt pulling up of the lorry, and also to the implication, which is probably involved, that the lorry had been proceeding at a reasonable speed; but I find myself quite unable to accept the view that the driver had been keeping a proper look-out. The driver's own evidence appears to me to negative such a finding. In the statement which he made to the police about two and a half hours after the accident he said that he saw the boy dash from the left footpath across the road to pick something up; that he did so and was about four feet from the front of the lorry when he suddenly turned round and faltered as he was almost up against the radiator. "I immediately," he said, "applied the brakes but before the lorry "stopped the boy was knocked down." His evidence in the witness box was somewhat at variance with this, though it had also certain common features. "As I came forward to that road" (i.e., Cliftonpark Avenue, which runs at right angles to Oldpark Road from opposite the tram rail junction already referred to) "I saw a boy in front of me running. He was "about six feet from me. I immediately applied my "brakes." On cross-examination he described the incident with somewhat greater particularity. "The "boy was a few paces from the footpath when I saw "him. He was running. I was about four feet "away when I saw him first. He stooped to pick

" up something. I saw no letter. He hesitated when " he was stooping. He was on his feet again when I " hit him. I was going 10 to 12 miles per hour when " I braked."

Now, no matter which of these accounts of the accident be accepted it seems to me that the driver was patently guilty of negligence. Whether, as his statement to the police conveys, he saw the deceased leaving the footpath when he must have been quite an appreciable distance away, or whether, as stated on cross-examination, he saw him first when he was only four feet away, the driver was in my opinion on his own admission guilty of grave negligence, for all the evidence agrees in this that he was within four or at most six feet from the deceased before he applied the brakes, and it was then quite impossible to avoid the accident. He never at any time sounded his horn or gave other warning of his approach. Notwithstanding Lord Wright's caution in *McLean v. Bell* (1) (at p. 27), against placing over-reliance on the dilemma argument, it appears to me that the driver in the present case is faced with the dilemma that he either saw the deceased in time to stop and didn't stop, or that, as I consider much more probable, he failed to see him, by reason of his not keeping a proper look-out, until he was within four or six feet of him. Confronted with the weight of evidence upon the first limb of the dilemma, and, anxious to establish the inability of the driver to avoid the consequences of the deceased's negligence, the defendants' counsel pressed upon us that we should accept the facts contained in the second limb. This, I think, it is really our duty to do, as it is based upon sworn testimony, whilst the former rests merely upon the unsworn statement made to the police. Accordingly, the conclusion appears to me irresistible that, as no traffic intervened to obscure the line of vision, the driver was guilty of negligence in not keeping a proper look-out and in failing to see the deceased until he was such a short distance away from him. Likewise the deceased was, as I have

(1) 1932 S.C. (H.L.) 21.

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already stated, guilty of a similar failure to look out for or to see the defendants' lorry.

In thus dissenting from the finding of the learned trial judge upon the issue of the defendants' negligence, I am satisfied that I am not acting contrary to any accepted legal authority. I am not disagreeing with him upon the credibility of witnesses whose evidence is conflicting. I am merely making what appears to me to be a necessary legal inference or deduction as to the defendants' negligence from the testimony of the driver of the lorry himself. This does not appear to me to be as strong a course for an appellate tribunal to have to take as is the drawing of inferences of fact—a procedure fully justified by such cases as *Coghlan v. Cumberland* (1), *S.S. Gairloch* (2) at p. 18, *Dominion Trust Co. v. New York Life Insurance Co.* (3), at pp. 257-8, and *Cooper v. General Accident Assurance Corporation* (4). It is my duty to overrule the decision if on full consideration I am of opinion that it is wrong.

This brings me to the consideration round which perhaps the greater part of the argument before us centred. Assuming that both the deceased and the defendants were guilty of negligence, is the plaintiff on the facts of this case entitled to judgment, or should the judgment entered for the defendants be allowed to stand ? Mr. McSparran strenuously contended on behalf of the plaintiff that the only issue remaining to be determined was whether the defendants could by the exercise of reasonable care and skill have avoided the consequences of the deceased's negligence ; and this question, he argued, must be answered in the affirmative. The negligence of the deceased was, he said, stepping off the kerb without taking proper precautions for his own safety ; but the driver of the lorry would have had ample time and opportunity to avoid this act of negligence on the part of the deceased if he had been keeping a proper look-out, and, accordingly, had applied his brakes in proper time. To this Mr. Fox replied for the defendants that the driver could not have been reasonably expected to see the

(1) [1898] 1 Ch. 704.
(2) [1899] 2 I.R. 1.
(3) [1919] A.C. 254.
(4) [1922] 2 I.R. 38.

deceased as soon as he left the footpath; and that in any event the deceased could, by the exercise of reasonable care in regard to his own safety, have avoided the consequences of the defendants' negligence. Mr. McSparran answered this argument by submitting that this latter issue does not properly arise in actions of this character; and in support of this submission he relied upon the old case of *Davies v. Mann* (1)—a memory from our student days—and, as more modern authority, upon certain passages in the speech of Lord Wright in *McLean v. Bell* (2). including his adoption of the language of Lord Sumner in *British Columbia Electric Railway Co. v. Loach* (3). He also cited to us from *The Eurymedon* (4), at p. 50, and from *Hayden v. McQuillan* (5), at p. 91. The propriety of this fourth question as it has been called—the question as to the plaintiff's avoidance of the consequences of the defendants' negligence—is a matter to which I have at various times given much thought both as a member of this Court and when sitting at *nisi prius;* and I have not the slightest hesitation in saying that it is an issue which has necessarily to be determined before verdict in every case in which there is any evidence proper to be submitted to a jury in support of it. This does not necessarily mean that the trial judge must put the issue to the jury (or, if there be no jury to himself) as a separate question; for, unfortunately, owing doubtless in part to the varying circumstances of the cases, and in part to the different views held by different judges, there is no standard and uniformly recognised form in which the questions in these negligence cases should be submitted to the jury and answered by them. I have known certain eminent judges who maintained that only one question need be put to the jury such as, for example, "Did the "defendant's negligence cause the accident"? or "Whose fault was it that caused the accident"? but I dislike this apparent simplicity, as it does not avoid—rather does it increase—the necessity for adequate

(1) 10 M. & W. 546.
(2) 1932 S.C. (H.L.) 21.
(3) [1916] 1 A.C. 719.
(4) [1938] P. 41, 50.
(5) [1930] I.R. 87, 91.

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direction to the jury upon the various legal issues involved, part of which it may be difficult for the untrained legal mind to retain clearly and accurately in the jury room. Further, the single question, with its answer, leaves the appellate court at the great disadvantage of having no definite information as to the jury's views regarding the several issues which are in fact involved in it.

To revert, however, to the propriety of the so-called fourth question, the necessity for it when supported by evidence appears to me to be clear both on principle and authority. Taking the matter first on principle, and bearing in mind that it is not so much causation as responsibility for an accident which has to be determined, one naturally asks how can such responsibility be ascertained without first answering the question whether the plaintiff could have avoided the consequences of the defendant's negligence. If he could have avoided it and did not do so he is at least jointly responsible, and he should not recover for an accident in which he was the sole or the joint author of his own wrong; whereas, on the other hand, if he had no opportunity of avoiding the defendant's negligence by the exercise or reasonable care and skill on his own part, the responsibility lies with the defendant who was negligent and who could have avoided the plaintiff's negligence but failed to do so. It is only by means of such a question (when, as I must repeat, there is evidence to support it) that it is possible to determine the "immediate," "direct," or "proximate" cause as distinguished from the *causa sine qua non* or "remote" cause of the accident. Further viewing the matter from the standpoint of principle, how can it be contended that a party's rights in such a case should be determined or even affected by whether he appears in the character of a plaintiff or a defendant? Yet such would be the result if a defendant were to be compelled to avoid a plaintiff's negligence whilst there was no corresponding duty on the part of a plaintiff to avoid a defendant's negligence. Again, would the position be altered if both parties had suffered damage in the collision, and both a claim and

counterclaim had to be determined ? In such a case if both were negligent and neither (because of their both being really plaintiffs) had to avoid the consequences of the other's negligence, the absurdity (for such it appears to me) would result of each of them having to pay the other's loss, instead of the loss in each case lying, as it ought to do, where it fell.

I now turn to authority in support of the view which I have expressed. Cases are so numerous and reports of many of them are so long that I must content myself with extracts from the more authoritative judgments. The first case to which I would refer is *Bridge v. Grand Junction Railway Co.* (1). In that case, which was one of demurrer, Lord Abinger, C.B., in the course of the argument for the defendant, observed : " The negligence of the plaintiff, in order " to preclude him from recovering, must be such as " that he could by ordinary care have avoided the " consequences of the defendants' negligence ; " and Parke, B., in his judgment said : " There may have " been negligence in both parties, and yet the plaintiff " may be entitled to recover. The rule of law is laid " down with perfect correctness in the case of *Butterfield* " *v. Forrester* (2), and that rule is that, although there " may have been negligence on the part of the plaintiff, " yet, unless he might, by the exercise of ordinary " care have avoided the consequences of the defendants' " negligence, he is entitled to recover ; if by ordinary " care he might have avoided them, he is the author " of his own wrong."

Four years later followed *Davies v. Mann* (3), in which the plaintiff, having fettered the fore-feet of his donkey, turned it into a public highway where it was grazing on the off side of the road when the defendant's waggon, drawn by three horses, ran into it and killed it. The plaintiff was held entitled to recover ; for, as Lord Abinger, C.B., said : as the defendant might, by proper care, have avoided injuring the animal, and did not, he was liable for the consequences of his negligence, though the animal may have been improperly there.

(1) 3 M. & W. 244.
(2) 11 East. 60.
(3) 10 M. & W. 546.

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When, however, the case of *Davies v. Mann* (1), is relied upon in the present case on behalf of the plaintiff it is in my opinion with an imperfect appreciation of the full legal position as there stated; for Parke, B., referred in his judgment to *Bridge v. The Grand Junction Railway Co.* (2), where, as he said, the correct rule was laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could, by ordinary care, have avoided the consequences of the defendants' negligence. He then reaffirms the portion of his judgment in *Bridge v. The Grand Junction Railway Co.* (2), which I have quoted above; and, accordingly, we find the rule in *Butterfield v. Forrester* (3) set out in the forefront of the headnote in *Davies v. Mann* (1) as "the general rule of law "respecting negligence." Such general rule had, however, in the opinion of the Court no real application to the facts of *Davies v. Mann* (1), as the donkey, having its fore-feet fettered, was unable to get out of the way of the defendant's waggon. It was impossible for the plaintiff to do anything which would enable him to avoid the consequences of the defendant's negligence.

Almost half a century later—in the famous case of *The Bernina* (4), Lindley L.J. in the Court of Appeal made (at p. 89) a pronouncement upon the law of negligence which I have always regarded as a model of clarity and accuracy. "The cases," he said, "which give rise to actions for negligence are primarily "reducible to three classes as follows:—

"1. A. without fault of his own is injured by the "negligence of B., then B. is liable to A. 2. A. by "his own fault is injured by B. without fault on "his part, then B. is not liable to A. 3. A. is "injured by B. by the fault more or less of both "combined, then the following further distinctions "have to be made:—(*a*) if, notwithstanding B's. "negligence, A. with reasonable care could have "avoided the injury, he cannot sue B. *Butterfield*

(1) 10 M. & W. 546.
(2) 3 M. & W. 246.
(3) 11 East. 60.
(4) 12 P.D. 58.

" *v. Forrester* (1), *Bridge v. Grand Junction Railway* " *Co.* (2), *Dowell v. General Steam Navigation Co.* (3); " (*b*) if, notwithstanding A's. negligence, B. with " reasonable care could have avoided injuring A., " A. can sue B. *Tuff v. Warman* (4), *Radley v.* " *London and North Western Railway Co.* (5) *Davies* " *v. Mann* (6); (*c*) if there has been as much want of " reasonable care on A's. part as on B's., or, in other " words, if the proximate cause of the injury is the " want of reasonable care on both sides, A. cannot " sue B. In such a case A. cannot with truth say " that he has been injured by B's. negligence, he " can only with truth say that he has been injured " by his own carelessness and B's. negligence, and " the two combined give no cause of action at " common law. This follows from the two sets of " decisions already referred to."

In my opinion these principles constitute a simple yet complete code, which, properly applied by judge or jury to the varying facts and circumstances of these collision cases, should provide with certainty a correct solution of the difficult problems with which they are from time to time confronted. Reduced to the narrowest compass they amount to this, that an injured party cannot recover the amount of his loss from another, no matter how negligent the latter may have been, if such injured party was by his own immediate or proximate negligence the real or the joint author of his own misfortune.

Both the English and Irish Law Reports of the last thirty years contain the reports of many important negligence cases. Some of them, such as *British Columbia Electric Railway Co. v. Loach* (7), *Swadling v. Cooper* (8) and *McLean v. Bell* (9), as decisions of the Privy Council and House of Lords, are, of course, cases of the highest authority. The first of them has a special importance because of its

(1) 11 East. 60.
(2) 3 M. & W. 244.
(3) 5 E. & B. 195.
(4) 5 C.B. (N.S.) 573.
(5) 1 A.C. 754.
(6) 10 M. & W. 546.
(7) [1916] 1 A.C. 719.
(8) [1931] A.C. 1.
(9) [1932] S.C. (H.L.) 21.

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recognition of the principle of continuing negligence, the defendant being held liable, though his negligence (but for which he might have avoided the consequences of the plaintiff's negligence) was not a new act subsequent in point of time to the plaintiff's negligence, but one (namely, proceeding with a defective brake) which, whilst prior in point of time, yet continued after the plaintiff's negligence, and in fact incapacitated him from exercising such care as would have avoided the consequences of the plaintiff's negligence. In other words "primary" negligence, if repeated or continued, may also be "ultimate" negligence rendering the defendant liable, notwithstanding a finding of contributory negligence on the part of the plaintiff. This is, in my opinion, not so much a new principle as a corollary from those enunciated by Lindley L.J. A defendant who negligently places it outside his power to avoid the consequences of another's negligence should not be, and, in fact, is not less responsible in law for an accident than is he who has the power but does not avail himself of it. It appears that in this *British Columbia case* (1) there was no further negligence on the part of the man who met his death after he looked up and saw the car, for there was nothing that he could then do to avoid the accident; so what killed him was the negligence of the railway company, though, as Lord Sumner expressed it, "it "was a close thing."

In *Swadling v. Cooper* (2). the trial judge had instructed the jury that the question for them was whose negligence was it that substantially caused the accident; and in the special facts of the case this was not held to be a misdirection. My only reason for referring to the case is because of Viscount Hailsham's statement of the law which (at p. 6) he declares to be "that even if you are injured by somebody else's "negligence, yet, if you substantially contribute to "those injuries by your own negligence you cannot "recover damages from the other person." Later (at p. 8) he makes a fuller statement on the lines of the judgment of Lindley, L.J., already referred to. "In

(1) [1916] 1 A.C. 719. (2) [1931] A.C. 1.

"order to succeed," he says, "the plaintiff must "establish that the defendant was negligent and that "that negligence caused the collision of which he "complains. If it is established from his own evidence, "or by evidence adduced on behalf of the defendant, "that the plaintiff could have avoided the collision "by the exercise of reasonable care, then the plaintiff "fails, because his injury is due to his own negligence "in failing to take reasonable care. If, although the "plaintiff was negligent, the defendant could have "avoided the collision by the exercise of reasonable "care, then it is the defendant's failure to take that "reasonable care to which the resulting damage is "due and the plaintiff is entitled to recover." The learned Lord next quotes the passage from the judgment of Parke B. in *Bridge v. Grand Junction Railway Co.* (1), cited in an earlier part of this judgment; and, referring to that case and to *Butterfield v. Forrester* (2), he said: "In both these cases there was a substantial "interval of time between the initial negligence of the "defendant or of the plaintiff respectively and the "negligence which was the proximate cause of the "injury; and the crucial question, upon which liability "depended, was whether either party could by the "exercise of reasonable care have avoided the conse-"quences of the other's negligence; if he could, then "that party is legally responsible for the accident. "But there are other cases in which the negligence "of the parties is contemporaneous or so nearly "contemporaneous as to make it impossible to say "that either could have avoided the consequences of "the other's negligence, and in which both have "contributed to the accident."

The third of the three cases to which I have referred is *McLean v. Bell* (3), in which Lord Wright delivered a speech which was strongly relied upon by Mr. McSparran, particularly the passage (at p. 28) in which, speaking of the pursuer, he said that she may have been negligent in proceeding to cross the street, "but that does not bar her claim, if the defender, by "the exercise of reasonable care and skill . . . could

(1) 3 M. & W. 244, 248.
(2) 11 East. 60.
(3) [1932] S.C. (H.L.) 21

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"have avoided the pursuer, even though the effect "of the pursuer's negligence, if she was negligent, "continued right up to the moment of impact." In my opinion it would be entirely wrong to convert these words, which in express terms related to the particular accident then under investigation by the House of Lords, into a general proposition absolving a plaintiff from responsibility for acts of negligence continuing up to the moment of collision. Any such intention is conclusively negatived by the words of the learned Lord on page 29, in which he asserts that in some cases "a pursuer, notwithstanding the defender's "failure to avoid the collision, might still at the last "moment by the exercise of reasonable care have "averted the casualty. In some such cases the "pursuer might be solely responsible, or might be "responsible equally with the defender. What has "been called the last opportunity may in such cases "need to be determined, and if that can be attributed "solely to the pursuer, or to the pursuer as well as to "the defender, the pursuer's claim must fail. But," he adds, and this is the keynote to the decision, "in "the present case there was evidence of eye witnesses, "as I have already stated, that at the critical moment "the defender could, while the pursuer could not, "have avoided the collision." Instead, therefore, of *McLean v. Bell* (1) assisting the plaintiff in the present case it appears to me to recognise and reaffirm the proposition that, when there is evidence to support it, legal responsibility for a collision cannot be satisfactorily determined without a consideration of whether the plaintiff as well as the defendant could have avoided it by the exercise of reasonable care.

I conclude my citation of authority by merely calling attention to the summing up of Lord Hewart L.C.J. to the jury in *Hargrove v. Burn* (2), in which he made a comprehensive statement of the principles of the law of negligence applicable to road accident cases in terms similar to those which I have endeavoured to expound; and, if Irish authority be looked for, I would refer to the case of *Neenan v. Hosford* (3), and

(1) [1932] S.C. (H.L.) 21.
(2) 46 T.L.R. 59.
(3) [1920] 2 I.R. 258.

particularly to passages on pages 273, 274, 276, 278, 282, 308 and 309.

When I apply these principles to the facts of the present case and put to myself the several relevant questions with a view to ascertaining the proximate or direct cause—the *causa causans* of the accident, I am in the first place irresistibily driven to the conclusion that both the defendants and the plaintiff were guilty of negligence. When I next consider the questions as to whether either party could have avoided the consequences of the other's negligence, I am equally clearly of opinion that, whether the crucial period of time for such test be, as would appear from *Swadling v. Cooper* (1), at p. 11, when the parties became aware of their respective positions, or, on the other hand, as at one time suggested in the arguments, when they ought to have become so aware, the conclusion is the same, for their negligence was simultaneous, and they were to all intents and purposes *in pari delicto*. Neither in fact saw the other until the accident had become unavoidable; both should have seen for they had equal opportunities of doing so. And, whilst fully appreciating the danger of laying down any general proposition which will be universally applicable, I think it can be asserted with confidence that in street accident cases if two parties in collision, who had an unobstructed view and opportunity of seeing and avoiding one another, did not in fact see one another until the accident had become unavoidable, then both were so directly to blame and in law responsible for the accident that neither can recover his loss from the other. Such loss must lie where it falls whether a party be in the position of a plaintiff or a defendant.

For all these reasons I am of opinion, though on different grounds from those which were relied upon by the learned trial judge, that the defendants are entitled to hold their verdict and judgment. An opportunity was afforded to each party of producing all the witnesses whom they desired to give evidence in regard to the accident, and this opportunity was

(1) [1931] A.C. 1, 11.

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fully availed of. The fact that the learned judge did not consider what I have called the fourth question (which, of course, in his view of the case did not arise) does not in my opinion debar this Court in such circumstances from arriving at its own conclusion upon it, more particularly as there is no material conflict of testimony between the parties in regard to the matter.

The plaintiff's motion must be refused with costs.

MURPHY, L.J.

MURPHY, L.J.: This is an appeal by the plaintiff from the judgment of Lord Justice Babington who tried this action without a jury, and on the 5th July, 1944, gave judgment for the defendants.

As the case was not tried with a jury I respectfully adopt the principles enunciated by Lindley, M.R., in *Coghlan v. Cumberland* (1), and by Andrews, L.J. (as he then was) in *Cooper v. General Accident Co.* (2), at p. 56, and I consider it to be my duty to rehear the case, to reconsider the materials before the learned trial judge, and then to make up my own mind "not "disregarding the judgment appealed from but care- "fully weighing and considering it, and not shrinking "from overruling it if on full consideration I come to "the conclusion that the judgment is wrong." It does not appear to me from the notes of the learned judge that much turned on the relative credibility of witnesses, though it must always be remembered that the judge who heard the witnesses examined and cross-examined has held that the driver of the lorry could not have avoided the accident, that he was keeping a proper look-out, that he saw the deceased as soon as he could reasonably have been expected to do so, that he pulled up promptly, and that he was not guilty of any negligence. I shall only refer to the evidence so far as it is necessary to do so in considering the several questions which, in my opinion, should have been put to a jury if the action had been tried with a jury.

The first question would have been: "Was the "driver of the lorry guilty of negligence, i.e., negli-

(1) [1898] 1 Ch. 704. (2) [1922] 2 I.R. 38, 56.

" gence which caused or contributed to the accident ? " On this question the judge has found that the driver was not guilty of negligence, but, accepting the driver's evidence as to the distance at which (be it six feet or four feet) he first saw the deceased, I cannot agree with this finding. I come to the clear conclusion on the evidence on this point, that the deceased left the footpath, in chase of the letter, at or very near the front of the " Dainty " shop, and that from this point to the point at which the accident occurred was at least 30 feet, and probably more than this. The map proved by Mr. O'Gorman on behalf of the plaintiff—the accuracy of which was not disputed—makes it evident that the lorry driver when driving citywards along the Crumlin Road would have the pavement from the letter box to Cliftonpark Avenue straight in front of him, the theory that he looked to his left to see if there was traffic coming from the Oldpark direction is not supported by any evidence, but, making all reasonable allowances, I am satisfied that, if he had been keeping a proper look-out, he ought to have seen the deceased running or hurrying in a diagonal direction across the road, in ample time to have allowed him to pull up his lorry before he struck the deceased, if his speed approximated to that estimated by him.

I am of opinion, therefore, that the answer to the first question should have been " Yes."

The second question put to a jury would have been : " Was the deceased guilty of negligence contributing " to the accident "? The finding of the trial judge that the deceased was negligent, is not challenged by Mr. McSparran, and on the facts could not be disputed in my opinion. The answer to this question, therefore, should also be " Yes."

The third question would have been : " If so, " could the lorry driver by the exercise of reason- " able care have avoided the consequences of " the negligence of the deceased " (or " avoided the " accident ") ? If I am right in the view which I have formed on the first question, it follows that in my opinion the lorry driver, if he had been keeping a

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proper look-out. could have applied his brakes much more quickly, and, if his estimate of the lorry's speed was even, approximately, correct, could have avoided the accident.

On the answers, therefore, to the three questions usually put to a jury in such a case, the plaintiff would have been, in my opinion, entitled to a verdict, but it seems to me that the real difficulty in the case arises if a jury or trial judge were to consider the further question : " Could the deceased by the exercise " of reasonable care have avoided the consequences of " the driver's negligence " (or " the accident ") ? In his dissenting speech in *Dublin Wicklow and Wexford Railway Co. v. Slattery* (1), at p. 1207, Lord Blackburn says : " By the common law . . . the damage lies " where it falls, and the plaintiff who is himself to " blame cannot recover though the defendant may " also be to blame. . . . The received and usual way " of directing a jury as to this, is to say that if the " plaintiff could by the exercise of such care and skill " as he was bound to exercise, have avoided the " consequence of the defendant's negligence, he can- " not recover." This is a statement of the law which agrees with that of Parke B. in *Bridge v. Grand Junction Railway Co.* (2), where that learned judge said : " The rule of law is laid down with perfect " correctness in the case of *Butterfield v. Forrester* (3), " and that rule is, that, although there may have " been negligence on the part of the plaintiff, yet " unless he might by the exercise of ordinary care " have avoided the consequences of the defendant's " negligence, he is entitled to recover ; if by ordinary " care he might have avoided them, he is the author " of his own wrong." Again, in *McLean v. Bell* (4), to which I shall have to refer at greater length later, Lord Wright says : " Thus a pursuer, notwithstanding " the defender's failure to avoid the collision, might " still at the last moment by the exercise of reasonable " care have avoided the casualty. In some such cases " the pursuer might be solely responsible or might be

(1) 3 App. Cas. 1155.
(2) 3 M. & W. 245.
(3) 11 East. 60.
(4) [1932] S.C. (H.L.) 21.

"responsible equally with the defender. What has "been called the last opportunity may in such cases "need to be determined, and if that can be attributed "solely to the pursuer or to the pursuer as well as to "the defender, the pursuer's claim must fail." As a clear illustration of the principle, I suggest the following set of circumstances. A. and B. are driving motors in the country on two equally important intersecting roads, and are approaching a cross road, the hedges on both roads have been cut low so that either driver could see the other, but neither is on the look-out for traffic on the other road and both are approaching the cross-roads at an excessive speed. Neither driver sounds his horn, and the two cars collide at the cross-roads. In this state of facts both drivers being negligent, it appears to me that either A. or B. as plaintiff in an action against the other could establish negligence against the defendant, and that the defendant by the exercise of reasonable care could have avoided the consequences of the plaintiff's negligence, but equally the defendant could establish that the *plaintiff* by the exercise of reasonable care could have avoided the consequences of the defendant's negligence. As A. and B. each owed the same duty to the other, it appears to me, on principle, that in such a state of facts *neither* should succeed in an action against the other ; if it were not so, *both* must succeed as plaintiffs and be defeated as defendants, a result, in my opinion, as contrary to sound law as it is repugnant to common sense. To find the "ultimate" or "proximate" negligence in collision cases seems to me frequently to involve metaphysical discussions as to causation in which, as in the case of the fallen Angels (engaged in similar arguments), the only result obtained may well be described in Milton's words : "And found no end in wandering mazes lost" ; but a judge or jury may come to the conclusion, on evidence, that both parties to an action were negligent and that the negligence of both continued up to the instant at which a collision was inevitable.

If this be the finding, it appears to me that neither can successfully sue the other, and while such a state

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of facts does not appear to have been the subject of any clear decision, I can find no authority which would throw doubt on this view, based on a principle, which seems well recognized, save, possibly, *McLean v. Bell* (1), to which Mr. McSparran referred us. I have already referred to one passage in the speech of Lord Wright, but there are two other passages which cannot be readily reconciled with this. In the first the learned judge says :- " She (the pursuer) may have been " negligent in so doing, but that does not bar her claim " if the defender, by the exercise of reasonable care " and skill (which does not mean anything superhuman " or exceptional, with all allowance for what is called " the agony of the moment) could have avoided the " pursuer, *even though the effect of the pursuer's negli-* " *gence, if she was negligent, continued right up to the* " *moment of impact*," and later he says : " If by the " word ' concurrent ' the learned judge is referring to " the fact that the pursuer was negligent in crossing " the road (if the jury found her to be negligent in so " doing) *and such consequences persisted up to the* " *moment of the collision*, he is, in my judgment, seeking " to apply as decisive a matter which was not so treated " as long ago as in the classic case of *Davies v. Mann* (2), " where the unfortunate donkey remained hobbled " on the highway till run over by the defendant ; in " that case *unless the donkey had been left as it was*, no " accident could have happened."

These passages, in which I italicize the important words, appear to me to be irreconcilable with that passage which I have quoted earlier in this judgment from Lord Wright's speech, and with the passage from Lord Hailsham's speech in *Swadling v. Cooper* (3), which Lord Wright quotes in extenso. It is also to be observed that while the terms of the jury's findings on the second trial in *McLean v. Bell* (1) do not appear, Lord Wright throughout his speech treats it as doubtful if the jury *did* find that the pursuer was negligent in crossing the street, and stated expressly that he would hesitate to hold that if the jury did find the pursuer

(1) [1932] S.C. (H.L.) 21.
(2) 10 M. & W. 546
(3) [1931] A.C. 1.

not negligent at all, their verdict was perverse. Obviously, unless the pursuer was found to be negligent, these passages, though, of course, entitled to the greatest respect, are *obiter dicta*. I cannot come to the conclusion that Lord Wright intended to depart from a principle which it seems to me is well settled—much in all probability must depend on the special facts in *McLean v. Bell* (1).

The enumeration by Lindley, L.J. (in *The Bernina* No. 2 (2), at p. 89) of the cases which give rise to actions for negligence is authoritative, and class 3 is thus stated by him : " A. is injured by B. by the fault " more or less of both combined, then the following " further distinctions have to be made—(*a*) if, notwithstanding B's negligence A. with reasonable care " could have avoided the injury, he cannot sue B. " (*Butterfield v. Forrester* (3), *Bridge v. Grand Junction* " *Railway Co.* (4), *Dowell v. General Steam Navigation* " *Co.* (5) ; (*b*) if notwithstanding A's negligence B. " with reasonable care could have avoided injuring A, " A. can sue B. (*Tuff v. Warman* (6), *Radley v. L. N.* " *W. Railway Co.* (7), *Davies v. Mann* (8) ; (*c*) if there " has been as much want of reasonable care on A's " part as on B's, or, in other words, if the proximate " cause of the injury is the want of reasonable care " on both sides, A. cannot sue B. In such a case A. " cannot with truth say that he has been injured by " B's negligence, he can only with truth say that he " has been injured by his own carelessness and B's " negligence, and the two combined give no cause " of action at common law."

In the present action at the close of the plaintiff's case the trial judge came to the conclusion that plaintiff had not proved that the lorry driver had been guilty of negligence, but for the purpose of seeing if he (the lorry driver) could, by the exercise of reasonable care, have avoided the consequences of the negligence of the deceased he allowed the case to proceed and the

(1) [1932] S.C. (H.L.) 21.
(2) 12P.D. 58.
(3) 11 East. 60.
(4) 3 M. & W. 245.
(5) 5 E. & B. 195.
(6) 5 C.B. (N.S.) 573.
(7) 1 A.C. 754.
(8) 10 M. & W. 546.

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lorry driver was examined and cross-examined. On hearing this further evidence the trial judge found that the lorry driver could *not* have avoided the accident, and, as on both these issues he found in favour of the lorry driver, he, of course, did not consider the question whether the *deceased* could have avoided the consequences of the lorry driver's negligence. Before us, as before the trial judge, it was contended on behalf of the defendants that the lorry driver, on the evidence, was not negligent, and that he could not have avoided the accident, and it is clear that the possibility of the deceased avoiding the accident after he had left the pavement was never the subject of consideration. While on the evidence the learned judge might have held that by looking for traffic at any instant as he ran, or hurried, in chase of the letter, or by running on when he hesitated after picking up the letter, the deceased could have avoided the accident, he has not considered these matters and, as I have said, when the learned judge found that the lorry driver had not been guilty of any negligence, such consideration would have been otiose. The facts appearing on the notes appear to me to constitute a case in which, if questions were to be submitted to a jury, one of these questions must be: "Could the deceased by the exercise of "reasonable care have avoided the accident" (or "the consequences of the lorry driver's negligence")? Andrews, L.C.J., has pointed out on many occasions the necessity, on suitable facts, for such a question, and the question has been put by him in other cases and also by Brown, J. I have referred to the "received "and usual way of directing a jury" according to Blackburn, J., in *Slattery's case* (1), and, having regard to his great experience in common law actions, I desire to refer to the words of Sir J. Campbell, C., in *Neenan v. Hosford* (2), at page 281: "I can testify from a long "experience in actions of this kind that even the "approved formula—could the defendant by the "exercise of reasonable care have avoided the conse-"quences of the plaintiff's negligence?—has been "responsible for many unreasonable verdicts in cases

(1) 3 App. Cas. 1155. (2) [1920] 2 I.R. 258.

"in which it was equally plain upon the evidence, "though no question upon it was submitted to the "jury, that the plaintiff on his part could also by the "exercise of reasonable care have avoided the conse- "quences of the defendant's negligence. Formerly "it was the practice with some judges to submit this "question in preference to the other, while in some "cases both were submitted; but in recent years it "has been the practice to submit the latter question "only, with the result in many cases of providing a "sympathetic jury with a tempting opportunity for "disposing of the case in favour of the plaintiff." I may say that the "appropriate questions" put forward "though with diffidence" by the same learned judge in this case seem to me to be calculated to confuse a jury, but I cannot see why a jury in a case similar to the present might not be expected to answer—with proper directions—the following questions:—(1) Was the defendant negligent? (2) Was the plaintiff negligent? (3) If so, could the defendant by the exercise of reasonable care have avoided the accident? and (4) Could the plaintiff by the exercise of reasonable care have avoided the accident?

Having regard to the observations of Lord Wright in *McLean v. Bell* (1) I should observe that *Davies v. Mann* (2) and *British Columbia Electric Railway Co. v. Loach* (3), have always been understood by me as cases in which, on the facts, the Court regarded the negligence of the plaintiff as "spent" at an instant at which the defendant, if driving with care (or if his brakes had been effective), could still have avoided the accident. If a pedestrian proceeds to cross a city street without paying any attention to on-coming traffic, and continues to cross the street until knocked down, it is difficult to show how and at what instant his negligence is "spent," but, in my opinion, such pedestrian can only succeed in an action for damages against the driver of the vehicle which knocked him down (however negligent that driver is proved to be) if he shows that he (the pedestrian) could not have

(1) [1932] S.C. (H.L.) 21.
(2) 10 M. & W. 546.
(3) [1916] 1 A.C. 719.

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avoided the accident by the exercise of reasonable care ; and if he continues to cross in a negligent fashion up to the instant of impact, he must fail in his action. Technically, the onus of showing that the *plaintiff* by the exercise of reasonable care could have avoided the accident would be on the defendant, but I think that this onus would be shifted once it was shown that a pedestrian started to cross a busy street in a negligent manner and continued to cross without, apparently, any regard for the traffic on the street.

While the determining issue in the case (in my opinion) was not considered at the trial, if we have all the necessary evidence on the notes, and if (as it would appear) no question arises as to the relative credibility of the witnesses, there is no sound reason why we should not come to a decision on the matter. Not without some doubt, I have come to the conclusion that as, presumably, all the witnesses who could give evidence on this issue were examined, and as no evidence was excluded, we should not send this case back for a new trial, but should give effect to the opinion which we form on the materials before us. On the evidence as given at the trial and appearing on the notes, I am clearly of opinion that the negligence of the deceased in running or hurrying off the footpath without any regard to the traffic on the street, was not " spent " prior to the accident, and that, at all material times, the deceased could have avoided the consequences of the negligence of the lorry driver. The answer to the last (the fourth) question must therefore be : Yes ; and on these answers the plaintiff's claim fails.

I, accordingly, agree with the Lord Chief Justice.

BLACK, J.

BLACK, J. : In this case the learned trial judge held that the negligence of the deceased boy Thomas Campbell was the sole cause of the accident and that the driver of the motor lorry was not guilty of any negligence and could not have avoided the accident.

The principles which regulate the duty of an appellate tribunal upon an appeal from a decision of a judge sitting without a jury have been laid down in a long

series of cases, one of the most recent and most useful of which is *Powell v. Streatham Manor Nursing Home* (1). I have considered the evidence in the light of those principles with all the care I can and I find myself quite unable to pronounce that the conclusions arrived at by the trial judge ought to be reversed. The whole incident which led to the unfortunate boy's death occurred within a very short space of time, probably not more than three seconds. The spot where the deceased was knocked down is fixed by Constable Turney's evidence as being on the left rail of the ingoing tramline where the Crumlin Road and Oldpark Road tramlines intersect just on the country side of the entrance to Cliftonpark Avenue. This spot is about 15 feet 6 inches from the nearest point of the kerb of the footpath from which the deceased ran out to retrieve the letter. There is no clear evidence as to the point at which the deceased left the kerb. The only witness who deals with it at all is Larmour, who says : " I *think* it was somewhere about the Bus Stop." In his deposition at the inquest he had placed it " *in* " *region of* the ' Dainty ' ". The trial judge finds that the deceased's point of departure from the footpath was not accurately fixed but that it was somewhere between the pillar box and the corner at Cliftonpark Avenue. The question as to where the deceased left the footpath is an important point in the case ; it is relevant to the length of time during which the lorry driver might have seen him on the roadway. The onus is on the plaintiff to establish his case ; and I think that the defendants are entitled to say that on this vague and meagre evidence the Court is not entitled to make an assumption unfavourable to the defendants by placing the point of deceased's departure from the footpath as far as possible from the corner of Cliftonpark Avenue and so assuming that he must have traversed perhaps 30 or 40 feet on the roadway before he was knocked down.

Even, however, if it is to be assumed against the defendants that the deceased left the footpath at a point 25 or 30 feet from the point where he was knocked

(1) [1935] A.C. 243.

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down there was evidence that he *ran* out from the footpath, and, if so, he could well cover this distance in a couple of seconds. The lorry driver coming down the Crumlin Road would not only be concerned with the possibility of traffic coming down Oldpark Road on his left but would also have to be very much on the look-out—especially at the midday dinner hour—for the possibility of pedestrians hurrying to cross towards the foot of Oldpark Road from the direction of Agnes Street and the tram stage on his right. In such circumstances a person darting out from the footpath on the driver's left might easily get several feet across the roadway before the driver could possibly realise that he might be going to rush across the front of the driver's lorry. Stress was laid by plaintiff's counsel on the lorry driver's statements under cross-examination (*a*) that the boy was a few paces from the footpath when he saw him, and (*b*) that he was about four feet away when he saw him first. But it requires no great experience of running down cases to teach the danger of deciding such cases upon estimates of distances made by witnesses, especially estimates based on supposed observation within perhaps a second of the actual happening of a collision when the witness's mind was certainly fixed on something else than making an estimate which could be accepted as accurate in the cold atmosphere of a Court. Personally I prefer to rely on the incontrovertible fact that possibly not more than two seconds may have elapsed from the time of the deceased's unexpected dash from the footpath until the moment when he was struck, and that this interval may have been even shorter if the point of his departure from the kerb was near the corner of Cliftonpark Avenue, as indeed it may well have been. In these circumstances, upon the issue whether on the evidence it was established that the lorry driver was guilty of negligence, it does not appear to me legitimate to pronounce that the decision of the learned trial judge was wrong and ought to be reversed.

Inasmuch, however, as the other members of the Court take the view that the evidence at the trial leads clearly to the conclusion that the lorry driver

was guilty of negligence, I have sought to consider the legal position on that basis. It is contended on behalf of the plaintiff that the question of liability falls to be determined by the answers to be given to what are said to be the three usual questions which should be submitted to a jury in such a case and which a judge should propose to himself when trying such a case without a jury, namely :—

1. Was the defendant negligent ?
2. Was the plaintiff (or the injured person) negligent ?
3. Could the defendant by the exercise of reasonable care have avoided the accident, notwithstanding the plaintiff's (or the injured person's) negligence ?

And it is said on behalf of the plaintiff that on the facts of the present case, if the first and second questions are answered " Yes " the third question should also be answered " Yes," and that accordingly the case should be decided in favour of the plaintiff.

I cannot agree that such a case as the present can be determined upon the answer to these three questions alone. In any case in which either party to an accident may have had an opportunity of avoiding the consequences of the other's negligence the real problem to be solved is " Which was the decisive and immediate " cause of the accident ? " (See per Lord Haldane in *Taylor v. Dumbarton Tramways Co.* (1). If the decisive and immediate cause was negligence on the part of the defendant, the plaintiff will be entitled to succeed : if the decisive and immediate cause was negligence on the part of the plaintiff, the defendant will be entitled to succeed : if it is not possible to say that the decisive and immediate cause was negligence of one rather than negligence of the other, in this case, too, the defendant will be entitled to succeed. The questions are submitted to the jury for the purpose of obtaining answers which will lead to a solution of this problem : " Which was the decisive and immediate, " cause of the accident ? " But as Sir James Campbell, C., pointed out, in *Neenan v. Hosford* (2), answers to

(1) [1918] S.C. (H.L.) 96. (2) [1920] 2 I.R. 281.

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these three so-called usual questions alone will not provide a solution of the problem in cases in which, although it could be contended that the defendant by the exercise of reasonable care could have avoided the accident notwithstanding the plaintiff's negligence, yet it could also be contended on the other hand that the plaintiff by the exercise of reasonable care could have avoided the accident notwithstanding the defendant's negligence. An example of such a case is that suggested by Murphy, L.J., of a collision between two motor cars at a cross roads where each driver had had an ample opportunity of observing the other and avoiding a collision. The two drivers being equally to blame it appears clear on principle that neither could successfully sue the other. *The Bernina* (1), per Lindley L.J. at p. 89. If, however, either of the drivers did sue the other and only these three so-called usual questions were left to the jury, the jury would be bound to return an affirmative answer to each with the result presumably that the driver who chanced to be plaintiff would be bound to succeed!

Accordingly, in cases in which upon the facts it is possible that the plaintiff by the exercise of reasonable care could have avoided the accident notwithstanding the defendant's negligence, it has become the practice of our Courts, under the guidance of the Lord Chief Justice, to submit a fourth question raising this issue in addition to the other three questions. For the proposition that this fourth question raises an issue proper to be considered there is ample authority. Thus in *Davies v. Mann* (2) itself, which is generally referred to as the leading authority for the submission of the third question, Parke, B., at the very outset of his judgment expounds the legal position as if the real question to be asked was the fourth question and not the third. At the end of p. 548 he says, "This subject "was fully considered by this Court in *Bridge v. The* "*Grand Junction Railway* (3) where, as appears to "me, the correct rule is laid down concerning negli- "gence, namely, that the negligence which is to pre-

(1) 12 P.D. 58, 89.
(2) 10 M. & W. 546.
(3) 3 M. & W. 244.

"clude a plaintiff from recovering in an action of this "nature, must be such as that he could by ordinary "care, have avoided the consequences of the defendant's "negligence." From a perusal of the reports one is inclined to think that the necessity for the submission of this fourth question in addition to the other three in cases in which it is appropriate has been apt to become obscured by a tendency either to phrase or to interpret the second question in such a way as to try to make the second question serve the purpose of both the second question and the fourth. But I think that the submission of the two questions as separate questions (accompanied of course by a proper direction to the jury by the trial judge) is calculated to conduce to the satisfactory trial of actions in which the facts warrant the submission of this fourth question.

I wish to guard myself, however, against being taken as laying down the proposition that the submission of these four questions will automatically and infallibly resolve all the difficulties regarding legal liability which may arise in connection with street accidents. Take the type of case which has been suggested for consideration both by judges and by text book writers of a pedestrian negligently walking along a tram track in front of a tramcar and obviously oblivious of his danger. The driver has him in full view for a considerable distance but negligently fails to stop the tramcar in time to avoid colliding with him. It appears that in such a case the owners of the tramway may be held liable in an action by the pedestrian (*Smith v. Browne* (1), *Gaffney v. The Dublin United Tramways Co.* (2), *Paul v. Great Eastern Railway* (3). Yet the last opportunity of avoiding the accident was almost certainly with the plaintiff. He could have stepped off the rails at the last moment and it would *prima facie* appear that if the four questions are submitted the answer to the fourth question must be in the affirmative. The learned editors of *Salmond on Torts* (9th Ed. p. 485) founding themselves on the observations of Lord Shaw in *Anglo-Newfoundland*

(1) 28 L.R.I. 1.
(2) [1916] 2 I.R. 472.
(3) 36 T.L.R. 344.

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Development Co. v. Pacific Steam Navigation Co. (1), at p. 420, offer the explanation that in such cases the plaintiff's negligence does not in a legal sense contribute to or cause the accident. It is not, properly speaking, contributory negligence at all. A similar explanation is offered in *Charlesworth on Negligence* at p. 439. And some support for the view may be thought to be found in the observations of Cockburn, C.J., in *Tuff v. Warman* (2) at p. 755. The matter is obviously one of difficulty, and it is a difficulty which will have to be faced if the four questions are to be adopted as standard in street accident cases.

Be this as it may, the point in the present case is that, assuming negligence on the part of the lorry driver, and plaintiff's counsel admitting negligence on the part of the deceased, the legal liability cannot be determined, as was contended by plaintiff's counsel, simply by asking whether the lorry driver by the exercise of reasonable care could have avoided the accident notwithstanding the deceased's negligence. The real question to be decided in such circumstances is, to use Lord Haldane's phrase, "Which was the "decisive and immediate cause of the accident?" And in my opinion this question cannot be properly decided by asking the third question only.

I have made these observations in deference to the argument which was addressed to us on behalf of the plaintiff. I would decide the appeal, however, on the ground that in my view it is not possible on the facts to say that the decision of the trial judge exonerating the lorry driver from negligence was wrong.

Solicitor for the plaintiff: *D. P. Marrinan.*
Solicitors for the defendants: *C. & H. Jefferson.*

J. McC.

(1) [1924] A.C. 406. (2) C.B.N.S. 741.

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THE BAPTIST UNION OF IRELAND (NORTHERN) CORPORATION LIMITED, APPELLANTS;
THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Dec. 14, 15, 1945.
Jan. 17.

Income Tax—Exemption—Charity—Fund to provide annuities for pastors, evangelists and missionaries paying specified subscriptions to fund, their widows and orphans—Income Tax Act 1918 (8 & 9 *Geo.* 5, *c.* 40), *sec.* 37 (1) (*b*).

The appellants were trustees of a fund which was established by the Baptist Union of Ireland for the purpose of providing annuities for pastors of the churches within the Union, evangelists under the control of the Union, and missionaries of the Irish Baptist Foreign Mission, and their widows and orphans.

By the Rules for the administration of the fund it was provided that it should be administered by the Union, that the pastors, evangelists and missionaries who and whose widows and orphans should benefit by the fund should be those admitted as members by a committee of the Union, that the persons so admitted should pay entrance fees and annual subscriptions of specified amounts, or single sums of specified amounts in lieu thereof, that the rights of any person whose subscriptions were in arrear or whom the Committee should think morally unfit to receive such benefit should cease, and that if the funds were sufficient certain specified annuities should be paid to such pastors, evangelists and missionaries on their retirement at the age of 65 years or on becoming permanently incapacitated, and to their widows and orphans. The fund was made up of voluntary donations and the sums received for entrance fees and annual subscriptions. The appellants also held certain investments on trust to defray the annual subscriptions and entrance fees of members of the fund.

Held, that the whole income from investments held by the appellants for the purposes of the fund and on trust to defray the annual subscriptions and entrance fees was applicable for charitable purposes only and was exempt from Income Tax.

Effect of contractual nature of benefits on charitable purpose of fund considered.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts after the hearing by them of a claim by the appellants as trustees of the Baptist Union of Ireland Annuity Fund for exemption from income tax in respect of certain investment income, on the ground that such income was applicable

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to charitable purposes only and was therefore exempt from income tax under the Income Tax Act, 1918, sec. 37 sub-s. 1 (*b*).

The facts are stated in the judgment.

Patton for appellants.

Curran, K.C., and *Nicholson* for the respondents.

MACDERMOTT, J. : The appellants in this case, The Baptist Union of Ireland (Northern) Corporation Limited, are trustees of The Baptist Union of Ireland Annuity Fund (hereinafter called " the Fund ") and, as such, hold certain investments for the purposes of the Fund. These I speak of as " the Fund investments."

The appellants claimed exemption from income tax in respect of the income of the Fund investments for the years 1939-40, 1940-41, 1941-42 and 1942-43 under the provisions of Section 37 (1) (*b*) of the Income Tax Act, 1918, on the ground that this income was applicable to charitable purposes only and had been so applied. This claim extended to the income of certain other investments derived from the estate of Mr. Alexander McCay which were also held by the appellants as trustees but upon trusts distinct from, though connected with, the trusts governing the Fund. I refer to these investments as " the McCay investments."

The appellants' entire claim was rejected by the Commissioners of Inland Revenue. The appellants thereupon appealed to the Special Commissioners. They dismissed the appeal and the present proceedings arise on a Case Stated by them for the opinion of this Court.

The Fund was established in 1902 by the Baptist Union of Ireland which has since administered it. The original rules constituting the scheme for the administration of the Fund provide for their alteration by the Union at the Annual Session of its Assembly and this power was exercised on the 26th May, 1939, when the rules were revised and given the form which they have since retained. The changes then made

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included a modification of the rates of contribution and provided for an increase in benefits. But the objects of the Fund remain as before; the changes were not fundamental and in my opinion do not affect the true character of the Fund in any material respect. In view of this and as they cover the period to which the appeal relates, save for a few weeks, the 1939 rules may be taken as constituting the relevant instrument for consideration so far as the Fund investments are concerned.

The Case Stated sets forth the circumstances and facts with such careful particularity that it will be unnecessary for the purposes of this judgment to quote from the 1939 rules at length. The following excerpts and references will suffice to indicate the salient features of the scheme.

By rule 1 the Baptist Union of Ireland undertakes to administer a Fund "formed partly by voluntary "donations and partly by subscriptions of members "and designated 'The Baptist Union of Ireland "'Annuity Fund.'" By rule 2 "the object of the "Fund is to provide annuities for its members their "widows and orphans." Rule 10 provides that the following shall be eligible for membership:—Members of the Union who are Pastors of Churches within the Union, Evangelists under the direction and control of the Union, Missionaries sent out by the Union, the Secretary of the Union and whole-time Principals or Tutors of the Irish Baptist College. Rule 12 provides for the admission of members by vote of the Committee of the Union after signature of an application form which binds the candidate to abide by the rules subject to any amendments that may be made by the Union from time to time. Rules 13-18 deal with the subscriptions payable by members, the normal basis of contribution being a percentage of the current stipend. Rule 19 provides for the termination of membership where a member's subscription is in arrear or the Committee think that the member is morally unfit to remain a member of the Fund. Rules 20-28 relate to the benefits payable. If funds are sufficient the ordinary annuity rates are:—£100 for

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members on retirement at 65 years of age or on earlier permanent incapacity; £50 for widows during viduity; and £10 for each orphan with a maximum of £30 for any one family. The claims of orphans are to cease on completion of the sixteenth year in the case of boys and of the eighteenth year in the case of girls.

The formation of the Fund by voluntary donations as well as by members' subscriptions has been a feature of the scheme from the beginning. In fact the payments made by members have been a comparatively small part of the total receipts, the figures for the period 1902-1940 being:—total amount paid by or on behalf of members £2,224 14*s.* 7*d.*; income from outside sources, £11,598 8*s.* 5*d.*

In 1920 Mr. Alexander McCay gave a sum of £1,000 to pay the annual subscriptions and entrance fees of members of the Fund on their behalf and by his will he left one-fourth of the annual income of his residuary trust estate upon trust for a similar purpose. This testamentary gift took effect in 1939 on the death of Mr. McCay. The investments representing both these benefactions are the McCay investments already mentioned. They were transferred to the appellants as trustees and are held by them as such, the income being applied in accordance with the trusts declared by Mr. M'Cay. On his death it became apparent that the income of the McCay investments would be considerably more than sufficient to satisfy all the subscriptions and fees payable by members of the Fund under its original rules and the main object of the revision of these in 1939 was undoubtedly to increase the subscriptions due by members of the Fund so as to absorb the testator's bounty and thus permit of the payment of annuities of a more generous scale.

The trusts of the Fund investments and of the McCay investments are therefore, as already indicated, distinct though related in the sense that the income of the latter is applied, in the form of members' contributions, for the purposes of the Fund. I cannot, however, regard this relation as of legal consequence so far as the questions for decision in this appeal are concerned. While it is true that during the period

under review the payments due to the Fund by its members have been made from the income of the M'Cay investments it is plain that such payments have been made on behalf of the members individually and that the operation of the McCay trust has not affected the purposes of the Fund or the rights and obligations of its members under the rules. The appellants' claim in respect of the income of the Fund investments may, therefore, be considered separately and it will be convenient to deal with it first.

The application of the income of the Fund investments during the relevant period to the purposes of the Fund was not challenged and the point for determination on this branch of the case is whether this income was, in the words of section 37 (1) (*b*) of the Finance Act of 1918 "applicable to charitable purposes only." The object of the Fund is clear. As stated in rule 2 it is to provide "annuities for its members, their "widows and orphans." Are these purposes entirely charitable? Both parties dealt with this question in two stages—first, they considered whether these purposes were all *prima facie* charitable and secondly, they inquired whether, if such were the case, the charitable complexion was effaced by the constitution of the Fund and, in particular, by what was called its mutual benefit character. This method of approach was based on the judgment of Rowlatt J. in *The Commissioners of Inland Revenue* v. *The Society of Widows and Orphans of Medical Men* and *The Commissioners of Inland Revenue v. The Medical Charitable Society of the West Riding of Yorkshire* (1), which was cited by both sides. This procedure seems suitable to the circumstances of this case and I will follow it as a convenient means of considering the points advanced in argument. It does not involve travelling outside the rules of 1939 and its adoption will not, therefore, prejudice the question whether in applying section 37 (1) (*b*) it is permissible to look beyond the terms of the relevant instrument and what may be implied therefrom.

For the purposes of the Income Tax Acts the

(1) 11 T.C. 1; 42 T.L.R. 612.

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expression "charitable" must, of course, be taken in its legal and technical meaning which is the same in this country as in England. *Commissioners for the Special Purposes of Income Tax v. Pemsel* (1). There is no exhaustive definition of what is charitable in this sense but it has long been settled that for a purpose to be charitable in point of law it must be within the preamble to the statute 43 Eliz. c. 4 or analogous to one or more of the objects specified therein. As Sir William Grant M.R. put it in *Morice v. Bishop of Durham* (2) "those purposes are considered "charitable, which that statute enumerates, or which "by analogies are deemed within its spirit and "intendment." The statute of Elizabeth did not extend to Ireland but the Irish statute 10 Car. I. sess. 3 c. 1 notwithstanding its limited application is to be regarded as *in pari materia*. See the judgment of Lord St. Leonards, when Lord Chancellor of Ireland, in *The Incorporated Society v. Richards* (3), and the *Attorney-General v. Delaney* (4) where Palles C.B. after referring to both statutes says: "the analogy "of the statute of 43 Eliz. c. 4 has been so applied "as to include everything comprised within the "larger words of the Statute of Charles 1st."

The rules of the Fund do not make its benefits subject to a means test. Indigence is not a necessary qualification and in the ordinary course the committee administering the Fund have no discretion as to the amount of the annuities payable. While it may, no doubt, be taken as unlikely that those to be benefited by the Fund will, as a class, be affluent, the rules do not discriminate between rich and poor and, accordingly, Mr. Patton for the appellants did not contend that the object of the Fund was the relief of poverty. He rested his case entirely on the ground that it came within the third category mentioned by Lord MacNaghten in his well-known classification of charitable trusts in *Pemsel's case* (1), i.e., "trusts for the "advancement of religion."

First, then, as to the benefits payable to members

(1) [1891] A.C. 531.
(2) 9 Ves. 399, 405.
(3) 4 Ir. Eq. R. 177.
(4) Ir. R. 10 C.L. 104, 125.

of the Fund. They belong to a class consisting of those who whether as pastors missionaries teachers or office-bearers all endeavour to advance the cause of the Christian religion in accordance with the basis of doctrine adopted by the Baptist Union. Had the purpose of the Fund been to supplement the stipend of such persons during their active ministry there could not, in my opinion, be any question as to its charitable nature. It would come within that part of the statute of Charles which speaks of "the maintenance of any "Minister and Preacher of the Word of God"; and apart from this, the maintenance of ministers and Teachers of religion, as such, has, I think, always been regarded as charitable since the word acquired a legal meaning.

The annuities for members of the Fund are payable, however, to those who have retired after attaining 65 years of age or who have become incapacitated earlier. I am not clear if in the Baptist Church retirement or incapacity, such as entitles a member of the Fund to an annuity, works a change of ecclesiastical status and for the purposes of this judgment I shall assume that on retiring or becoming incapacitated a member ceases to have any active or special part in the advancement of religion. The main argument of the appellants on this aspect of the case is untouched by this assumption. It urged that provision for the superannuation of retired or disabled ministers of religion promoted the advancement of religion in that it—(*a*) removed a natural anxiety from the minds of those on active duty, thus enabling them to devote the whole of their time and their full energies to the work of the Church, (*b*) tended to encourage recruitment, and (*c*) made for a more effectual ministry by facilitating retirement when the weight of years or physical infirmity made efficient service no longer possible.

Now in weighing an argument of this sort one must be alert not to reckon consequences which, however worthy, are remote or merely incidental. See *Attorney-General v. Haberdashers Co.* (1), per Lord Brougham C. But on the other hand it has, I think, to be borne

(1) 1 My. & K. 420, 427.

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in mind that the charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than in its immediate and expressed objects. Thus a gift to augment the stipend paid by a congregation is charitable, not because it meets the material needs of its minister for the time being, but because by providing for his maintenance it enables him to perform his clerical office and advance religion among the members of his congregation ; and similarly with the repair of a church or the building of a school. On the cases it is permissible to look some distance beyond the expressed objects for the purpose of seeing where they lead. The trouble, as ever, is to draw the line in the right place and distinguish between what is and what is not too remote. Having given the best consideration I can to the authorities I have come to the conclusion that the contention of the appellants on this point cannot be rejected without ignoring the definite trend of judicial decision. It will suffice to refer to three of the numerous cases which may be regarded as having a bearing on this particular aspect. In *In re Charlesworth, Robinson v. Archdeacon of Cleveland* (1), a testator bequeathed certain stock upon trust to apply the income in payment of the expenses of dinners which a Clerical Society held preparatory to their meetings and which had theretofore been paid for by the members out of their own pockets. The Society was charitable as being for the advancement of religion. In the course of his judgment, Eve, J., says : " The members of the Society who attended the " meetings had to travel there at their own expense, " and many no doubt were not too well blessed with " this world's goods. No doubt the testator was " aware of this, and thought that one of the reasons " which tended to decrease the attendance at the " meetings was the expense of the midday dinner. " Accordingly with the object of increasing the use- " fulness of the Society, he made this bequest. It " seems to me that the result of relieving members " from the expense of the dinner must tend to increase

(1) 26 T.L.R. 214.

"the objects calculated to advance religion. I do not "think I should be justified in holding this gift to be "bad because some of the members were perfectly "well able to pay for the dinner. I therefore hold "that the bequest is a good charitable gift."

This decision, though its facts have no relation to the present case, certainly shows that one may regard more than the immediate object of a gift for the purpose of ascertaining if it is for the advancement of religion. *In re Forster, Gellatly v. Palmer* (1), warrants the same conclusion. There a testatrix bequeathed an annual sum to the Society for the Relief of Infirm, Sick and Aged Roman Catholic Secular Priests in the Clifton Diocese. Secular priests in the Diocese were eligible for membership and each member had to pay an entrance fee as well as an annual subscription. The funds of the Society which were fed by voluntary donations as well as by the payment of members, were applicable "for the Relief of Infirm, Sick and "Aged Roman Catholic Secular Priests Members of "the Society." On a summons to determine whether the gift took effect it was contended on behalf of the Society that it was a charity because its funds were devoted to the relief of poverty and were also clothed with a trust for the advancement of religion. Bennett J. decided against the argument that the funds were for the relief of poverty but he held that the Society was a charitable institution and that the gift was a good charitable bequest saying :—"The second ground "taken was that the Society was a charity because its "funds are clothed with a trust for the advancement "of religion. I hold that on this ground the gift can "be supported. Indirectly I think the cause of "religion is advanced by a fund which is to be employed "to assist sick, aged and infirm ministers of religion. "Such a fund, I think, tends to make the ministry "more efficient by making it easy for the sick and old "to retire and give place to the young and healthy. "It may, I think, also ease the minds of those actively "engaged in the ministry to know that there is this "fund to be used for their relief, when they are over-

(1) [1939] Ch. 22.

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"taken by old age or struck down unexpectedly by "sickness."

This decision comes close to the present case in so far as it relates to the benefits conferred on members of the Fund and I cannot see that the conclusion I am asked to draw by way of connecting its provisions for the superannuation of elderly and infirm ministers of religion with the advancement of religion goes further or is different in any fundamental respect from that reached by Bennett J. In *In re Mylne, Potter v. Dow* (1), the validity of a testamentary trust for the benefit of certain Christian workers, including retired missionaries, was considered. Farwell J. held that the gift was charitable, not as being for the assistance of poverty but as being for the advancement of religion and in the course of his judgment he says: "the fact "that the gift is for the benefit of, among others, "'retired' missionaries, does not prevent its being "a gift for the advancement of religion, for it may "well be that a gift providing for 'retired' mission- "aries may encourage people to take up missionary "work. The gift is, therefore, a good charitable gift, "its objects being, amongst others, retired missionaries "or acting missionaries, subject to certain conditions."

This decision is, clearly, in point and I have no hesitation in following it, particularly as it seems to me to come well within the intendment of the Statutes. Accordingly I hold that the purposes of the Fund, in so far as they benefit the members of the Fund, are *prima facie* charitable.

What then of the provision for the widows of members? A gift for the benefit of widows *simpliciter* is not charitable. See *Attorney-General v. Forde* (2). There are, it is true, a number of cases, such as *Attorney-General v. Comber* (3), *Powell v. Attorney-General* (4), *Thompson v. Corby* (5), and *In re De Carteret* (6), in which gifts for the benefit of widows were held to be charitable. But in all these cases the Court implied poverty or distress in some degree and it is clear that

(1) [1941] Ch. 204.
(2) [1932] N.I. 1.
(3) 2 Sim. & St. 93.
(4) 3 Mer. 48.
(5) 27 Beav. 649.
(6) [1933] Ch. 103.

the absence of such a qualification would have affected the decisions. Here, however, I am not asked to imply poverty. I am asked to apply the argument already considered in respect of members and to say that the provision which the Fund makes for their widows is, on similar if not identical reasoning, for the advancement of religion. There was not cited nor have I succeeded in finding any authority offering direct guidance on this point. It is one of some difficulty; but if I am right in the view I have formed regarding the benefits conferred on members I think it is hard to put the benefits conferred on their widows in a different category. The existence of such benefits may well encourage recruitment for the Baptist ministry—a circumstance akin to that which weighed with Farwell J. in *Potter v. Dow* (1). In addition it seems to me impossible to ignore the probable effect of such provision on married members during the period of their active work in the furtherance of religion. Not only will it "ease the minds of those "actively engaged in the ministry," to use the words of Bennett J. in *Gellatly v. Palmer* (2), but it will assist in easing their pockets of the full monetary burden which the discharge of what is, after all, an elementary moral obligation would otherwise entail, thereby enabling them to devote their time and resources more completely to their clerical duties. I think the provision made by the Fund for the benefit of widows falls within the spirit of the Statutes and I therefore hold that this purpose of the Fund is *prima facie* charitable as well.

On the same grounds and also because the "education "and preferment of orphans" is within the Statute of Elizabeth I hold that the purposes of the Fund in so far as they benefit the orphans of members are *prima facie* charitable. See also *Jackson v. Attorney-General* (3), where Barton, J., held that a gift to Presbyterian missions and orphans was a good charitable gift.

I therefore reach the conclusion that the purposes

(1) [1941] Ch. 204.
(2) [1939] Ch. 22.
(3) [1917] 1 Ir.R. 332.

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of the Fund—i.e., the provision of annuities for its members, their widows and orphans—are all *prima facie* charitable. I may add that while this view cannot be vouched by reference to authority covering all the three aspects it embraces, I have not found reason to think that it conflicts with judicial or professional opinion on the subject. Indeed the case of the *Trustees of Psalms and Hymns v. Whitwell* (1), rather indicates the contrary. There trustees published a hymn book, prepared for the Baptist denomination and, pursuant to the directions of their deed of trust, distributed the profits "to and amongst the "widows and orphans of ministers and missionaries "of the Baptist denomination, or such or so many of "them as they in their uncontrolled discretion should "think fit. . . ." The trustees claimed that their trust was established for charitable purposes only and that their trade profits should, therefore, be exempt from tax by virtue of section 105 of the Income Tax Act, 1842. The Commissioners of Inland Revenue contended that this section did not apply to trade profits and this view was upheld by the Court (Stephen and Charles JJ.). But the contention of the trustees that the trust was for charitable purposes only was evidently accepted and the whole case, including the judgments, proceeded on the basis that the trust was charitable. No doubt the trustees had a discretion which would have enabled them to choose as recipients those most in need. They were not, however, bound to do so and I think the case, while not in point as an authority, at least shows that in 1890 a trust for the widows and orphans of Baptist ministers and missionaries could be regarded as charitable in the legal sense without exciting opposition from the Commissioners or comment from the Court.

I now turn to the second aspect of the question. Is the nature of the Fund such as to rob its purposes of this *prima facie* character so that, in point of law, they are not charitable? Counsel for the respondents contended vigorously that this question should be answered in the affirmative. They did not argue that,

(1) [1890] 3 T.C. 7.

if the purposes of the Fund were for the advancement of religion, they were too circumscribed to constitute a public charity. Their submissions were directed to what was described as the commercial nature of the Fund. They said that in substance it was all a matter of mutual benefit which savoured of bargain rather than bounty; and they emphasised that the rules evidenced a business-like contract binding the members and that the payments thereunder were payments "as of right" so far as the monies available permitted. At this juncture it may be well to point out that, whatever its true nature, the constitution of the Fund lacks at least one of the characteristics usual in a friendly or mutual benefit society. It is a fund of the Baptist Union of Ireland and it is administered by a committee of that Union. Its members as such have no voice in the administration. They do not elect the committee and the power of altering the rules is vested not in them but in the Union.

Mr. Curran, for the respondents, however, did not rest his argument on this or any other feature peculiar to the Fund. He put his submission in the form of a general proposition which was expressed thus—"where a body of persons pay subscriptions to a fund "and obtain benefits therefrom under a contract "which entitles them to such benefits as of right, then, "in law and irrespective of whether or not the fund "is augmented by voluntary donations, or the benefits "considered by themselves are charitable in nature, "such a body of persons are not established for "charitable purposes only and the fund is not applic-"able to charitable purposes only."

This is a broad and far-reaching contention capable of extending well beyond the bounds of the present case and it merits a careful consideration of the authorities which were cited by both sides in argument upon it. I will refer to them, so far as possible, in chronological order.

In *In re Clark's Trust* (1), a legacy bequeathed to the Ringwood Friendly Society had been duly paid over to its trustees in 1841. In 1874 the Society was

(1) 1 Ch. D. 497.

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dissolved and the question arose as to who was entitled to the fund representing the legacy. The petitioner claimed as representing those entitled to the testator's residuary estate and the Attorney-General sought a *cy-près* application of the fund on the ground that the Society was founded for charitable purposes. Hall V.C. decided in favour of the petitioner and the material part of his judgment is as follows:—"It "appears to me that the first inquiry is whether the "gift to the Friendly Society is a gift to a charity. "I have been furnished with a copy of the rules of the "Society, which was originally founded in July, 1777, "and from them it appears to me that the Society was "one whose members were to provide by subscriptions "and fines a fund to be distributed for their mutual "benefit in cases of sickness, lameness, or old age. "Poverty of the member at the time of his sickness "or lameness, or in his old age, was not required to "entitle him to an allowance. It appears to me that "the Society was not a charitable institution." This decision has been much canvassed in later cases and I think more, perhaps, has been read into it than the terms of the judgment warrant. The decision was that that particular society was not a charity but the reasoning was based on a scrutiny of the society's objects and not, so far as I can see, on the view—which the head note certainly suggests—that a friendly society cannot be a charity. In 1881 in *Spiller v. Maude* (1), a somewhat similar question arose as to the funds of the York Theatrical Fund Society, the members of which had all died. The personal representatives of the last survivor claimed the fund so far as derived from members' subscriptions and the Attorney-General submitted that the fund was subject to a charitable trust which had failed and that it should be paid over to the Royal General Theatrical Fund Association which, like the York Society, made provision for indigent members of the theatrical profession. Jessell M.R. held that the whole fund of the York Society, whether derived from voluntary subscriptions or contributions of members was dedi-

(1) 32 Ch. D. 158 (n).

cated to charitable purposes and he provided for its *cy près* application by directing the fund, less costs, to be paid to the Royal General Theatrical Fund Association for its purposes—a direction which necessarily involved a finding that that Association was also charitable. In *Pease v. Pattinson* (1), a proposal to transfer part of a charitable fund to a particular Miners' Relief Fund Friendly Society raised the question whether the latter was a charity. By its rules membership was confined to miners in a certain area and the objects of the Society were stated to be the raising of funds by voluntary subscriptions among the members thereof and by donations, to make provision, in case of fatal accident, for defraying the funeral expenses of members and supporting their families and "to make suitable provision for members "suffering by accidents which were not fatal, to render "assistance to all members who were unable to follow "any employment from old age or infirmity, and over "60 years of age and also for the payment of a sum "at the death of a member." Bacon V.C. held that the Society was a charity. Though his judgment as reported does not give reasons it is to be observed that the decision was reached despite the argument that "the question in the present case is whether "menbership of this Society amounts to more than "an insurance contract by which, on payment of a "certain sum of money, a person coming under "certain conditions is entitled to receive money out "of the Society's funds according to the rules"—a point very similar to that now raised by the respondents. *Cunnack v. Edwards* (2) dealt with the funds of a friendly society all the members and annuitants of which had died. The object of the society was the relief of widows of deceased members. The Court of Appeal (Rigby L.J. doubting) held, affirming Chitty J. on this point, that the Society was not a charity. Mr. Curran stressed in particular the passage in the judgment of Lord Halsbury L.C. commencing at p. 681, where he says:—"I do not think that a per-"fectly business-like arrangement like this, in which

(1) 32 Ch. D. 154. (2) [1896] 2 Ch. D. 679.

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"a number of persons associate together and contribute funds to provide for their own widows, has ever been regarded as charity. I think the observations of Hall V.C. in *In re Clark's Trust* (1), are entitled to great weight. His observations were directed to a society whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefit in cases of sickness, lameness, or old age. In *Pease v. Pattinson* (2), and *Spiller v. Maude* (3), it was assumed by the learned judges in those cases, whether rightly or wrongly it is immaterial to consider, that the relief of poverty and suffering formed one of the elements of the associations therein discussed. Here no such question can possibly arise; it cannot be pretended that a wealthy widow would not be entitled to claim her annuity equally with a poor one. If this be a charitable institution it would be difficult to contend that every life insurance company did not fall under the same category."

That the purpose of the fund in that case—the benefit of the widows of deceased members—was held not charitable accords with the view I have already expressed, but I do not regard the decision as laying down any rule to the effect that a society or body whose rules in their form and content are business-like or commercial *cannot* be charitable. Indeed I rather think that this decision, as well as that in *In re Clark's Trust* (1), may have been intended to dissipate an idea that the element of mutual aid to be found in a friendly society could of itself give a charitable nature to the common object. Had the benefits in *Cunnack v. Edwards* (4) been available only for poor widows the decision of the Court of Appeal would have carried Mr. Curran's argument far, but in that event the judgments upon which he relies would have taken a very different form. As they stand they do not decide the question now before me.

The scope of the decision in *Cunnack v. Edwards* (4) fell to be considered a few days later by Kekewich J.

(1) 1 Ch. D. 497.
(2) 32 Ch. D. 154.
(3) 32 Ch. D. 158 (n).
(4) [1896] 2 Ch. 679.

in *In re Buck, Bruty v. Mackey* (1). That was a suit brought to ascertain what was to be done with a legacy to a friendly society called the Commercial Travellers' Society which had become moribund, only one member and one beneficiary remaining. The object of the Society was "to provide a fund for the relief of sick "and distressed members, their widows and children." The rules laid down a scale of subscriptions for members varying according to age and provided that members who became sick and distressed or infirm were to be entitled, at the discretion of the committee, to a weekly sum not exceeding a certain figure and that the widows and children of deceased members in distressed circumstances should receive certain benefits. It is also clear from the report that the funds of the Society were augmented by voluntary donations. Kekewich J. while regarding this as a matter not to be forgotten did not consider it conclusive as to whether the Society was a charity. On that, after referring to *Cunnack v. Edwards* (2), and *In re Clark's Trust* (3), he said: ". . . . when you find poverty "referred to in the provisions of such a society as "this, it is impossible to say that this society is merely "'a business-like arrangement' or 'a mutual insur-"'ance society.' Therefore I am not precluded by "the authorities from saying that this society is a "charity, which I hold it to be."

In re Lacy, Royal General Theatrical Fund Association v. Kydd (4), concerned a testamentary gift to the Association to which the fund in *Spiller v. Maude* (5) was transferred, and the question arose whether the Association was a charity. *Cunnack v. Edwards* (2) was cited in support of the contention that it was not. Stirling J. held that it was, saying "the first point "is whether the Royal General Theatrical Fund "Association is or is not a charity. This turns on "the terms of the charter dated January 29, 1853, "and the rules therein referred to, particularly rules "15, 18 and 19. It was considered in *Spiller v.*

(1) [1896] 2 Ch. 727.
(2) [1896] 2 Ch. 679.
(3) 1 Ch. D. 497.
(4) [1899] 2 Ch. 149.
(5) 32 Ch. D. 158 (n).

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"*Maude* (1), by Sir George Jessell M.R. who held "that the Association was a charity, and with that "opinion I respectfully agree. I do not consider that "*Spiller v. Maude* (1) was overruled or intended to "be overruled by *Cunnack v. Edwards* (2)." In a footnote to the report the material rules of the Royal General Theatrical Fund Association are set out. The object was "to raise by subscriptions from the "members thereof, by voluntary donations and be-"quests from members and others, and by public "dinners and theatrical benefits, a stock or fund for "making a provision by way of annuity for aged and "decayed members, and also for funeral expenses, as "hereinafter mentioned." By rule 15 any member who contributed regularly for seven years was to be "entitled to receive such annuity for life as the annual "available income of the funds . . . shall from year "to year afford." Rules 18 and 19 in effect provide a means test for the different classes of subscribing members and were obviously aimed at ensuring that only those in indigent or distressed circumstances should benefit. Now in the case of that fund the purpose was charitable because it was the relief of distress, while here the Baptist Union Annuity Fund, if charitable, is so because its purpose is the advancement of religion. But apart from this distinction there is a marked similarity between the rules governing both funds on several points which the respondents relied upon as negativing charity. In each case the rules present a certain business-like flavour, in each membership is on a contractual basis with an obligation on members to subscribe specified amounts, and in each the benefits are payable "as of right" in the sense that they are not at the absolute discretion of some body such as a board of trustees or committee of management. *In Braithwaite v. Attorney-General* (3) the question whether a friendly society known as the Benefit Society for Girls educated at the School of Industry, Kendal, was a charity fell to be determined, the objects of the society having become exhausted.

(1) 32 Ch. D. 158 (n).
(2) [1896] 2 Ch. 679.
(3) [1909] 1 Ch. 510.

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In holding that the society was not a charity, Swinfen Eady J. said: "the society was one whose members "were to provide by subscriptions and fines a fund to "be distributed for their mutual benefit in cases of "sickness and old age. Poverty of the member at the "time of sickness or old age was not required to "entitle her to the benefits of the institution. She "acquired a legal right to these benefits by reason of "her membership and paying her dues under the rules. "It cannot be contended that a wealthy member "would not be entitled to her annuity equally with a "poor one. The funds of the society were augmented "by contributions of honorary members, which formed "the 'children's fund,' but the funds of the society "were not clothed with any charitable trust, and their "character was not wholly, or to the extent of the "addition, varied by such addition; see *In re Clark's "Trust* (1), *Cunnack v. Edwards* (2)." The case is thus on a par with *In re Clark's Trust* (1), and so far as I am able to see does not really carry the matter further.

I was also referred to *Grand Lodge of Masons of Scotland and Others v. Commissioners of Inland Revenue* (3). There the Grand Lodge claimed exemption under section 11 (3) of the Customs and Inland Revenue Act, 1885, from corporation tax in respect of certain income on the ground, to quote the material words of the sub-section, that it was "legally "appropriated and applied . . . for any charitable "purpose." The income in question was applicable to the relief of necessitous Masons or their dependants, at the discretion of certain administering bodies. The income was derived partly from the contributions of those who, or whose dependants, might benefit, but largely from other sources. The Court of Session held that the exemption applied. In the course of his judgment the Lord President dealt with an argument, very similar to that addressed to me by the present respondents, which was based upon the earlier cases of the *Incorporation of Tailors in Glasgow* (4) and *The*

(1) 1 Ch. D. 497.
(2) [1896] 2 Ch. 679.
(3) 6 T.C. 116.
(4) 2 T.C. 297.

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Linen and Woollen Drapers (1), and he distinguished them, saying, "I think, therefore, it comes to a "question of degree." The two cases mentioned by the Lord President were also corporation tax cases arising on the same enactment, the first in Scotland in 1887, and the other in England in the same year. In each the funds of the institution concerned were held not to be "legally appropriated and applied for "any charitable purpose." In each stress was laid on the mutual and contractual character of the benefits provided rather than on the object of both institutions which was the relief of distress and seemingly charitable in the legal sense according to the current of authority since *Pemsel's case* (2). At first glance these two decisions, though in apparent conflict with some of the authorities to which I have already referred, appeared to lend considerable support to the contentions of the respondents. On closer examination, however, I do not think that this is so or that any useful purpose would be served by discussing further their complicated facts or the judgments which were delivered, as it has been decided by the Court of Appeal in England in *In re Bootham Ward Strays, York* (3), that in sec. 11 (3) of the Act of 1885, the words "charitable purposes" have not the extended meaning and are not employed in the technical sense applicable to their construction in relation to the Income Tax Acts. See the judgment of Lord Herschell, at pp. 165 and 166 of the report.

The next cases cited were *The Commissioners of Inland Revenue v. The Society for the Relief of Widows and Orphans of Medical Men.* and *The Commissioners of Inland Revenue v. The Medical Charitable Society for the West Riding of Yorkshire* (4). Rowlatt J. held both these societies entitled to exemption under section 37 (1) (*b*) of the Act of 1918. After finding that the purpose of each society was the relief of indigence and, therefore, *prima facie* charitable, he proceeds to deal with what I may call the mutual benefit argument, saying: "It seems to me that when "it is said that the relief of poverty is a charity within

(1) 2 T.C. 651.
(2) [1891] A.C. 531.
(3) [1892] 2 Q.B. 152.
(4) 11 T.C. 1; 42 T.L.R. 612.

"the meaning of the rule which we are discussing "that does mean the relief of poverty by way of "bounty; it does not mean the relief of poverty by "way of bargain. A purely mutual society among "very poor people whose dependants would quite "clearly always be very poor would not, I think, be a "charity; it would be a business arrangement, as has "been said in one of the cases, whereby contractual "benefits accrued to people whose poverty makes "them very much in need of them. That would not "be a charity. I think, therefore, that the crux of "this case is whether this is a case of that sort. It is "true that the doctors in these two Societies are "invited to qualify, by a subscription which will help "the funds to a certain extent, infinitesimally in the "London case but more substantially in the other "case, with regard to their respective resources, for "contingent relief by these Societies. On the other "hand, what do we find the people who get the "benefits are really getting? They get the advantage "of subscriptions of their own people; they get the "advantage of the subscriptions of all other people "whose families are not indigent, and they get the "advantage of all the donations made elsewhere. "They have not any right to anything; the funds are "vested in trustees who have to do their duty, of "course, faithfully, but they have to select the objects "with a view to making, as far as their resources go, "a due and fair relief of indigence. Under those "circumstances I believe the question comes to this; "is that really a bargain mutually between the "members for mutual relief limited to the contingency "of indigence, or is it really only a means of qualifying "for the receipt of what is in itself a charity? I am "bound to say that I agree with Mr. Latter, that "the case, so far as I am concerned, is absolutely "bound by authority, and the authority is *Spiller v. Maude* (1)."

It will be observed that this line of authorities, if the two corporation tax cases of 1887 are left out of account, as I think they ought to be, presents no

(1) 32 Ch. D. 158 (n).

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instance in which a fund *prima facie* charitable, was held not to be charitable on grounds such as those urged on behalf of the respondents. No doubt it is a very important factor in favour of a finding of charity if the objects of the fund in question are, *prima facie*, charitable, yet I think it would not be correct to say that what is in itself apparently charitable must always manifest a charitable purpose. Rowlatt J. in the judgment from which I have just quoted contemplates that the relief of poverty may not always be charitable and I think it is possible, without being fanciful, to conceive of cases illustrating not only this but a similar situation in relation to other forms of charity. What, then, is the element in these cases of mutual or contractual benefit which will serve to distinguish the real from the pseudo charity?

To ask whether the "charity" is public or private will not give the answer, save in instances where the two questions, which are quite different, overlap. Then there are the dicta suggesting "bargain or "bounty" as a test. That, however, is not a very precise test as I think the cases show that the existence of a contractual or bargaining element between the management of a fund and its beneficiaries will not necessarily prevent the purposes of the fund from being truly charitable. Again, it has been suggested that if a beneficiary's contract secures him a benefit "as of "right" instead of what someone else may think fit to give him, the fund providing the benefit cannot be charitable. This "as of right" element may be a useful circumstance in ascertaining the legal position in given cases but I cannot regard it as a conclusive test of general applicability. I find it difficult to see any distinction between (i) a contract whereby A. in certain events is entitled to receive an annuity of a specified amount if funds permit, and (ii) a contract whereby A. is entitled to receive such sum as B. in the *bona fide* exercise of a discretion shall think proper, which is sufficiently fundamental to rank as more than a matter to be taken into account. I think the authorities support that view and I think they also show that the existence of an element of voluntary

bounty in the composition of the trust fund is not in itself necessarily conclusive.

I doubt if there is any single factor which can invariably settle the matter. I think what one has to do in these cases is to regard all the relevant facts, relationships and characteristics which the trust exhibits or implies and then to see whether or not, when duly marshalled and weighed, they reveal the presence of whatever is the mark of the truly charitable purpose. Thus, in cases such as this, it will be material to consider such matters as, for example, the terms of the contract binding the beneficiaries, the composition of the fund from which benefits are payable, whether the benefits are " as of right " or discretionary and whether the beneficiaries control the fund or are merely attached contractually to a management in which they play no effective part. A survey of this sort, however, will not take one very far unless whatever marks the genuine charity can be identified. In searching for this in cases of the type under discussion—the so-called mutual benefit cases—it is unnecessary to explore all the attributes of a legal charity, as one is dealing with what is *prima facie* charitable. What one wants to find is how far the promotion of the personal interests of contributors to the trust fund can go without destroying the apparently charitable nature of its objects. The authorities present no yardstick or formula for the purpose and in the nature of things such could not be expected. But help can, I think, be found in the judgment of Fitzgibbon L.J. in *In re Cranston, Webb v. Oldfield* (1)—the case in which the Court of Appeal in Ireland held that Vegetarian Societies were charitable. In his well-known analysis of the nature of a legal charity, Fitzgibbon L.J. at p. 446, of the report says that one of its essential attributes is that " it shall be *unselfish*, i.e., for the " benefit of other persons than the donor. . . ." I do not think this means that those who want to found or support a charity must exclude themselves from all benefit under it. I do not think authority supports such a narrow meaning and the words used

(1) [1898] 1 I.R. 431.

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do not require it. But reading them as I have no doubt they were intended to be read, and regarding them in conjunction with the cases to which I have referred, I am of opinion that the mark or test of what is truly charitable, in the limited field I have described, is that it should be substantially, not necessarily absolutely, altruistic in character. That, I think, is the element for which one must seek. And when the facts are found the conclusion whether or not they manifest that element is a matter of law. *Royal Choral Society v. Commissioners of Inland Revenue* (1).

For these reasons I find myself unable to accept the general proposition enunciated by Mr. Curran. And coming to the circumstances of the Fund itself I am unable, after considering the rules which state its objects and govern its administration, to find its purposes any less charitable than those of the funds which were the subject of decision in *Spiller v. Maude* (2) and in *In re Lacy* (3). It is true, as I have said, that the charitable purpose here lies in a different category from that of the Royal General Theatrical Fund Association. One is for the advancement of religion, the other for the relief of distress. In my opinion, however, this does not justify a different view of the present case, which, on applying the test I have endeavoured to describe, appears to me to warrant the conclusion that the purposes of this Fund—managed, as it is, by the Baptist Union of Ireland to the exclusion of its membership, supported, as it is, in substantial measure by voluntary donations and aimed, as it is, at the advancement of religion through the benefits it confers on the Baptist ministry—are sufficiently altruistic in character to retain their *prima facie* nature and so remain charitable and only charitable, in point of law.

On principle, then, and on authority I hold, on this branch of the case, that the income of the Fund investments is applicable to charitable purposes only.

It remains to consider the claim to exemption in respect of the income of the M'Cay investments. The

(1) 25 T.C. 263.
(2) 32 Ch. D. 158 (n).
(3) [1899] 2 Ch. 149.

terms of the Case left me in some doubt as to whether it was intended to deal with this income, but at the hearing this was removed by the production of a letter, dated the 26th May, 1943, from the Secretary of the Board to the appellants' solicitors and the reply thereto, dated the 8th June, 1943. This correspondence shows that, though no clear distinction was drawn by the parties between what I have called the Fund investments and the McCay investments, the appeal to the Special Commissioners was intended to relate to the income of both funds and should be so construed. The claim in respect of the income of the McCay investments must, therefore, be considered and I think there is sufficient material in the case as stated to enable me to do so without a reference back.

The McCay gifts benefit only those who are on active duty as subscriptions cease to be payable when a member becomes an annuitant (rule 15). The trusts of the McCay investments, therefore, relieve those ministers and missionaries of the Baptist Union of Ireland, who are members of the Fund, of the financial obligations of their membership during the period of their service in the cause of religion. Membership being a means of discharging, on advantageous terms, the duty to provide for dependants bound by the closest of family ties, the expenditure which it involves cannot be regarded as other than reasonable and proper for those ministers and missionaries to incur. In defraying this expenditure what the McCay provision really does is to supplement the stipend of each member by the amount of his contribution to the Fund. The bounty attaches to the office and is, I think, as clearly charitable as an express gift to augment the stipend of a particular class of ministers of religion—say those with families—would be.

Accordingly, I hold that the trusts of the McCay investments, as set out in the case, are altogether charitable and that the income thereof which is applied in accordance with those trusts is applied for charitable purposes only.

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In the result the Appeal succeeds and is allowed with costs.

Solicitors for the appellants: *C. & J. Black.*
Solicitor for the respondents: *F. C. MacNeice,* Solicitor to the Ministry of Finance.

J. M.cC.

BAXTER v. BAXTER.

K.B.D. (Matrimonial) 1945.

Divorce—Desertion—Conduct of party charged—Intention to desret. Mar. 2, 5.

The parties were married on 21st October, 1940; they spent the wedding night together and shortly afterwards spent a week-end as man and wife; these were the only occasions when they lived together as man and wife. At the time of the marriage the respondent was a private in the army, from which he was discharged on 4th June, 1942. After the marriage the respondent visited the petitioner from time to time; the petitioner wrote to the respondent about twice a week, and he wrote to her less frequently. The petitioner applied for enlistment in the Auxiliary Territorial Service, and informed the respondent that she had done so; on 26th May, 1941, she was called up. After May, 1941, the respondent never wrote to the petitioner and never visited her until 12th August, 1941, when he came unexpectedly to Carrickfergus where she was then stationed; the petitioner asked the respondent why he had not telegraphed to her as she could have arranged for leave, he said that he did not know that that could be arranged; when he was leaving he suggested that the petitioner should come with him and that they should spend a week-end together, she said she had not got leave, and refused to do so. The respondent never gave the petitioner any money, but she got an army allowance as his wife. At Christmas, 1941, the respondent sent a Christmas card to the petitioner's mother on which he wrote begging for 10*s.* 0*d.* The only subsequent occasions when the parties met were when they met by chance on a railway station and the respondent when passing the petitioner said to her, "Do you want a divorce?" and walked on without waiting for an answer, and at the service of the petition when on being served the respondent said that "it suited him "fine."

On the hearing of a petition by the wife for a decree of divorce on the ground of desertion,

Held, that the petitioner was entitled to a decree on that ground.

WIFE'S petition for divorce on the ground of desertion.

The facts are stated in the judgment.

Conaghan for the petitioner.

There was no appearance for the respondent.

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MURPHY, L.J.: In this case, which is a wife's petition based on desertion, at the conclusion of the evidence I stated to the petitioner's counsel Mr. Conaghan, that I should require to hear him fully as to the law applicable to the facts, and I have had the advantage of a most careful and persuasive argument by him in the course of which he cited and commented on a number of reported cases.

I considered that the petitioner and her mother were truthful witnesses, and the facts which have been proved to my satisfaction are as follows:—

The petitioner and respondent were married on the 21st October, 1940. The respondent was at that time a Private in the Royal Inniskilling Fusiliers stationed at the Depot in Omagh. He obtained seven days leave on the occasion of his marriage but on the day of the wedding only one day of this leave was unexpired, and the wedding night was spent by the married pair, as man and wife, in the petitioner's home, a house on a small farm of about fourteen acres some eight miles from Omagh. Shortly after the wedding, the petitioner and respondent spent a week-end as man and wife, this time at the house of the respondent's parents in Belfast. These were the only occasions on which the petitioner and respondent lived together as man and wife. The respondent was certainly not an affectionate husband, the petitioner told me that he never kissed her save on the occasion of her marriage and, I may say, the petitioner neither expressed nor exhibited any concern over this lack of affection. The respondent visited the petitioner at her parents' home from time to time coming from the Omagh Depot, but never spent the night with her. After January, 1941, his visits were less frequent. The petitioner had applied for enlistment in the Auxiliary Territorial Service, and informed the respondent of this fact, and on the 26th May, 1941, she was called up. She was first posted to Ballymena, where she remained for three weeks, she was then posted to Ballykinlar, where she remained two months, and finally to Carrickfergus. She wrote to the respondent about twice a week and he wrote to her less frequently.

He did not visit her while she was at Ballymena or Ballykinlar, but came to see her at Carrickfergus on August 12th, 1941. He was then dressed in "civvies," they had supper together and went to the pictures. The petitioner asked why he had not sent a telegram to her, as she could then have arranged for leave—which is granted to the Auxiliary Territorial Service so as to enable wives to spend their leave with husbands who are in the Services—the respondent's excuse was that he did not know that this could be arranged. When leaving by train for Islandmagee (to visit his mother) the respondent suggested that the petitioner should come with him and spend a week-end together, but as she had not obtained leave she, rightly, refused to do so.

At this stage the respondent's Army Record may be referred to; he deserted on the 19th August, 1941, rejoined on the 2nd January, 1942, he was admitted to hospital on the 9th March, 1942, and discharged from hospital on the 6th May, 1942, and was finally discharged from the Army on the 4th June, 1942.

As from this date therefore, as Mr. Conaghan argued, he was free to have set up a matrimonial home if he had been minded to do so, though it must be observed in this connection that he seems to have been a ne'er-do-well who was constantly begging his wife in his letters to send him small sums of money.

The respondent never wrote to the petitioner after May, 1941, but at Christmas, 1941, he sent a Christmas card to the petitioner's mother and begged on it for 10*s.* 0*d.* to enable him to return from Eire; he never made any reference to the petitioner on this card.

The only other occasions on which the petitioner and respondent met were, first, a chance meeting at York Street Railway Station on the Bank Holiday in August, 1942, when the petitioner and two other members of the Auxiliary Territorial Service were waiting for a train to Carrickfergus and the respondent came off a train from Larne. On this occasion when passing the petitioner the respondent said "*Do you want a divorce*" and walked on without waiting for an answer. The next and final meeting

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was on the occasion of the service of the petition, the petitioner was present to identify the respondent who on being served merely remarked that "it suited "him fine."

The respondent never contributed any money to the petitioner, but she received the Army Allowance of 28*s.* 6*d.* a week and as she said "My husband got "most of it."

The respondent, as I have said, ceased to write to the petitioner as from May, 1941. The petition was presented on the 6th December, 1944.

Coming to the authorities, I agree with Mr. Conaghan that the discussion by the Judge Ordinary in *Williams v. Williams* (1), of the meaning of "desertion" is very helpful in the present case—I refer to his judgment at pages 547 and 548 of the original report. *Lawrence v. Lawrence* (2) is a decision on facts differing markedly from those in the present case, and I do not find in the report any general principle which would be of value.

In *Kay v. Kay* (3), Gorell Barnes, J., having referred to *Fitzgerald v. Fitzgerald* (4), and *Bradshaw v. Bradshaw* (5), says: "The only effect of that is to show "that the word 'co-habitation' as used in *Fitzgerald v.* "*Fitzgerald* (4) does not necessarily mean that the "parties are living together under the same roof, but "that there may be states of co-habitation when they "see as much of each other as they can, and yet are "not separated because there has not been any real "suspension of their ordinary conjugal relations. A "man may be co-habiting with his wife even if "he is away on a visit or on business because the "conjugal relationship is not determined in any "shape or form."

Mr. Conaghan also referred me to the judgment of Sir Henry Duke, P., in *Pulford v. Pulford* (6), in which, after commenting on the judgment of Lord Penzance in *Fitzgerald v. Fitzgerald* (4), the learned

(1) 3 Sw. & Tr. 547, 164 E. R. 1388.
(2) 2 Sw. & Tr. 575, 164 E. R. 1120.
(3) [1904] P. 382, 389.
(4) L.R. 1P. & M. 694.
(5) [1897] P. 24.
(6) [1923] P. 18.

President says (at p. 21): "It has been almost a "commonplace in this Court to hold that in order to "ascertain whether there has been desertion you must "look at the conduct of the parties. There may be no "matrimonial home and yet no forfeiture of the rights "of the spouses. Desertion is not the withdrawal "from a place but from a state of things. . . . The "law does not deal with the mere matter of place. "What it seeks to enforce is the recognition and "discharge of the common obligations of the married "state." As explained in *Jackson v. Jackson* (1), these words do not refer to a mere refusal or abandonment of sexual intercourse while the parties continue to abide under the same roof.

I have read and considered all the authorities to which Mr. Conaghan has referred me, and amongst other cases which I have read are *Henty v. Henty* (2)—where the husband, having got into financial difficulties, enlisted and went with his regiment to India, was discharged from the Army and got a lucrative appointment in a Bank in India. He ceased after a time to correspond with his wife and contributed nothing to her support and on the facts was held to have deserted his wife—and *Davis v. Davis* (3).

Mr. Conaghan referred me to *Slawson v. Slawson* (4), a recent (1942) decision of Bucknill, J. I have read this case—which was a decision on special facts—and do not think that the learned Judge intended to lay down any general principles. If, however, the case can be cited as an authority that the failure of a wife, who had filed an answer denying the desertion, to contest the petition at the hearing can be treated as evidence that she did not intend to return to her husband, the petitioner, I respectfully would decline to follow it.

On the whole case, I have come to the conclusion, having listened to Mr. Conaghan's argument, that the facts show that the respondent as from August 12th, 1941, "broke off more or less completely the "intercourse that previously existed" between himself

(1) [1924] P. 19.
(2) 33 L.T.(N.S.) 263.
(3) 124 L.T. 795.
(4) 167 L.T. 260.

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and his wife, and that his remark, in August, 1942, "Do you want a divorce" can be used to show his *animus deserendi* at an earlier date. I think that this remark could not have been uttered by him, at a chance meeting and when passing the petitioner, if he had not had in his mind for some time previously the dissolution of the marriage.

Mr. Conaghan has satisfied me that, while there was no co-habitation between these spouses (in the sense of living together under the same roof) since a time very shortly after their marriage, this does not prevent the petitioner from establishing desertion. There was *consortium vitae* between these spouses and I hold that as from August 12th, 1941, the respondent intended to and did put an end to this *consortium*.

While, as I have said, the petitioner did not appear to have been distressed by the respondent's lack of affection, Mr. Conaghan has argued that the judgment of the Lord Chief Justice in *Black v. Black* (1), shows that, as the deserted spouse and never having consented to the desertion, it was not incumbent on her to show that she was at all material times willing and eager that the respondent should return to her, and as I am satisfied that the petitioner did not consent to the desertion, I am not concerned with her present attitude towards the respondent.

I therefore hold that the petitioner is entitled to the relief which she seeks and shall accordingly grant a *decree nisi* with costs against the respondent.

Solicitors for the petitioner: *Shields & Murnaghan.*

J. McC.

(1) [1943] N.I. 62.

MORAN v. HOWARD & COMPANY, LIMITED.

K.B.D.

1944.
June 29, 30,
1945.
Feb. 12.

Master and servant—Workmen's Compensation—Injury to Workman—Agreement to accept compensation—Ignorance of option to claim compensation or to take other proceedings—Workmen's Compensation Act (Northern Ireland), 1927 (17 & 18 Geo. 5, c. 16), s. 29 sub-s. (1)—Acceptance of compensation under the Act—Claim to recover damages at common law for the same injuries.

The plaintiff on 15th November, 1943, was injured by an accident arising out of and in the course of his employment by the defendants, and was disabled. On 18th December, 1943, he went to the defendants' place of business and had a conversation with a clerk in the defendants' employment who had charge of claims by workmen under the Workmen's Compensation Act, about the amount to which he was entitled under the Act in respect of the injuries which he had received. At this interview the clerk produced a form of receipt commencing with a declaration that having elected to take compensation under the Workmen's Compensation Act, 1927, the plaintiff agreed to accept during total disablement the weekly sum of £1 15*s.* 0*d.* in satisfaction of the compensation payable by the defendants for the accident; £1 15*s.* 0*d.* was the weekly amount to which the plaintiff was entitled under the Act.

The plaintiff signed this document knowing that the weekly payments under it were to be made by the defendants in respect of their liability under the Workmen's Compensation Act, 1927, but not knowing of any right of action against the defendants which he might have independently of the Act, and not appreciating the meaning or the effect of the election which he purported to make. The defendants paid the agreed sum to the plaintiff every week until 19th March, 1944, when the payments ceased; he signed a receipt for each payment; until 3rd January, 1944, the receipts were all on the original form of agreement, the subsequent receipts were on separate vouchers, the word "compensation" was written on all of them, and none of them was stated to have been given without prejudice to the plaintiff's rights independently of the Act.

On 21st January, 1944, the plaintiff's solicitor wrote to the defendants alleging that the plaintiff's injuries were caused by the negligence and breach of statutory duty of the defendants, and claiming damages; a correspondence ensued in the course of which the defendants' solicitors stated that they could not see that the defendants were under any liability at common law and that it was not a certainty that there was any liability under the Workmen's Compensation Act. The plaintiff learned of his rights against the defendants at common law a few weeks before 19th March, 1944.

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v.
HOWARD &
COMPANY,
LIMITED.

In an action brought by the plaintiff to recover damages for negligence and breach of statutory duty by the defendants causing the plaintiff's injuries.

Held (1), That the signing by the plaintiff of the receipt form purporting in terms to make an election did not constitute a valid and final election by reason of his want of knowledge of his alternative rights and his ignorance of his right to elect under section 29 sub-section (1) of the Workmen's Compensation Act (Northern Ireland), 1927, between his remedy under the Act and his remedy independently of it.

(2). That such election was not made final or binding on the plaintiff by the subsequent acceptance by him of weekly payments of compensation before he became aware of his right so to elect.

(3). That the plaintiff was entitled so to elect notwithstanding that for a few weeks after he became aware of his right to do so he accepted payments of compensation the receipts for which contained no declaration of election and which were made by an employer who expressed doubts as to the plaintiff's right to compensation.

(4). That the plaintiff was entitled to damages giving credit for the amount of the weekly payments received by him.

ACTION for damages for personal injuries caused by the negligence and breach of statutory duty of the defendants.

The facts are stated in the judgment.

Curran, K.C., and *McSparran* for the plaintiff.

Fox, K.C., and *Hanna* for the defendants.

ANDREWS, L.C.J.

ANDREWS, L.C.J.: The plaintiff in this case claims damages for injuries alleged to have been sustained by him "by reason of the negligence, breach of duty "and breach of statutory duty of the defendants in "the management, control and operation of a certain "concrete mixer." After the plaintiff's case had closed and three witnesses had given evidence on behalf of the defendants in regard to the making of certain weekly payments by the defendants to the plaintiff, Mr. Fox intimated, on behalf of the defendants, that he did not intend further to contest the issue of negligence, and would rely solely on paragraph 11 of the Defence in which the defendants pleaded that prior to the institution of the action they admitted their liability to pay compensation under the Work-

men's Compensation Acts, and that the plaintiff accepted weekly payments in respect of such compensation, which, it was submitted, barred the plaintiff's right to bring this action.

The material facts upon this issue are as follows :— On 15th November, 1943—the day of the accident—the plaintiff, who was a labourer in the employment of the defendants, was being instructed in the duties of a driver of a concrete mixer. The work, which was being performed at Nutt's Corner, Crumlin, was in connection with a contract which the defendants had entered into with the Air Ministry. The plaintiff, who was 31 years of age, had worked for some years upon farms, but subsequently became a labourer to building and other contractors, the defendants being his sixth such employer. His experience was, accordingly, both varied and extensive for a man of his age. It was whilst attending to grease caps, whilst the engine of the mixer was in motion, that he was caught in the chain and roller of the machine and sustained serious injuries to his head and left hand—all the more serious by reason of the fact that he was left-handed. He was taken to the Royal Victoria Hospital, where he remained for seventeen days, and was then transferred to the Belfast Emergency Hospital, Saintfield Road, where he was kept as a patient for a further fifteen days, being finally discharged on 17th December, after which he received treatment from his own doctor.

During the period he was detained in the Royal Victoria Hospital he received several visits from a fellow-worker named Patrick Rush, who, appreciating the plaintiff's straitened financial circumstances, took up a collection on his behalf amongst his fellow-workers. I am satisfied on the evidence that on one of these occasions at least they discussed the matter of payment by the firm to the plaintiff in respect of his injuries ; but whether the term used was "compensation," "compo" or "money" is and must remain a matter of some doubt, for memory on such a matter is fallible. It is possible, indeed, that it may have been none of these which was used ; for, as is well known, the expression frequently employed

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on such occasions is "half wages." The precise term used does not, however, appear to me to be very material. On Rush's evidence I hold that the plaintiff agreed that Rush should speak on his behalf to a man called Thomas McDonagh, the member of the defendant's clerical staff who had charge of Workmen's Compensation matters. This Rush did, with the result that when the plaintiff went out to Nutt's Corner on 3rd December—the day following his discharge from the Royal Victoria Hospital—after speaking first to some of his fellow-workers, he proceeded to the office where McDonagh was. A conversation took place between them, which McDonagh says followed upon the plaintiff's saying that he wanted to know if his compensation had come through for him. This the plaintiff denies. I do not propose, however, to set out in detail the conflicting testimony of these two witnesses in regard to the alleged use of the term "compensation"; for I am absolutely satisfied that, whatever term was used, the entire conversation, apart from enquiries as to the plaintiff's condition, related to the compensation money which the plaintiff was entitled, and knew that he was entitled, to receive under the Workmen's Compensation Acts in respect of his accident. It was at this interview that McDonagh produced a receipt form, headed in large capital letters with the words "Workmen's "Compensation Act," with a space left for the "Claim No." This receipt form commenced with a declaration signed by the plaintiff that, having elected to take compensation under the Workmen's Compensation Act, 1925, he agreed to accept during total disablement the weekly sum of 35*s.* 0*d.* in satisfaction of the compensation payable by Messrs. J. Howard & Co., Ltd. (the defendants) for the accident he met with when engaged in his employment on 15th November, 1943. This signature of the plaintiff's was witnessed by McDonagh, as were also two other signatures which he made at the same time by way of receipts for the payment of two sums of £1 15*s.* 0*d.* each in respect of the weeks ending 25th November and 2nd December, respectively. It is admitted that

the sum of £1 15*s.* 0*d.* was the weekly amount to which the plaintiff was at that time entitled under the Workmen's Compensation Acts. Further, it will be observed that the first payment ran, not from the day of the accident, but from 18th November, making due allowance for the statutory provision that, if the incapacity lasts less than four weeks, no compensation is payable in respect of the first three days. On the occasion of the plaintiff's next visit—a fortnight later—he received the 17*s.* 6*d.* then due to him under the Act for these first three days. All this, according to McDonagh, was fully explained to the plaintiff; and McDonagh also states positively that on the first occasion he read over to the plaintiff the top portion of the form in which the plaintiff declared his election to take compensation under the Workmen's Compensation Act. Parenthetically, I may say that I attach no importance to Mr. Curran's point that in the form the Act was referred to as of the year 1925—the year in which the English Act was passed—instead of 1927, the year of our Northern Ireland Act; for all relevant provisions of these Acts are admittedly identical, and what really matters is the reference to workmen's compensation, negativing, as it does, any suggestion of the payments made being of a purely compassionate or gratuitous character. Later, further receipts for the weekly payments were given, those paid up to and including 3rd January, 1944 (by a clerical error written on the form as "1943") being upon the original form; whilst subsequent receipts, owing, according to John Denning, the defendants' cashier, to internal office arrangements, were given upon separate petty cash voucher forms. All these last-mentioned vouchers, which bear the plaintiff's signature and were not stated to have been given "without "prejudice," had written upon them the word "compensation"; and the first of them, dated 28th January, 1944, had the words "Workmen's Com-"pensation" written prominently across it in red ink. It is not wholly unimportant also to note that on 7th February the sum of £2 was paid, owing to Denning not having proper change; and this excess payment

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of 5*s.* 0*d.* was duly credited on the occasion of the next payment of two weeks' compensation on 21st of the same month. This latter incident the plaintiff remembers and admits; but in most other respects his evidence is directly at variance with that of the defendants' witnesses. In particular, he denies that he was ever told, or that he knew, that the money which he was receiving at the fixed rate of 35*s.* 0*d.* per week was paid to him by way of compensation under the Workmen's Compensation Acts. In this conflict of testimony I have no hesitation in accepting the evidence of the defendants' witnesses.

It was on 21st January, 1944, that the plaintiff's solicitor wrote to the defendants, alleging negligence and breach of statutory duty, claiming adequate compensation, otherwise such proceedings as might be advised would be instituted, and reserving all rights under the Workmen's Compensation Acts, the letter to be accepted as a notice of accident and provisional claim under the Acts. A correspondence followed, the only importance of which for our present purposes was the purely negative one that neither side made any reference in it to the weekly payments which had been made or to their alleged legal effect. Messrs. C. & H. Jefferson first took over the defendants' side of the correspondence with a letter of 24th February which was somewhat relied upon by Mr. Curran on behalf of the plaintiff; for, after stating that they could not see any liability at Common Law, they added "it was not a certainty that there was any "liability under the Workmen's Compensation Act," concluding with an expression of their preparedness to consider any suggestion for a lump sum settlement under the Workmen's Compensation Act. From this rather unfortunate expression of doubt, where doubt there was none, Mr. Curran submits with considerable weight that the defendants did not consider themselves bound by any payments which had been made under the Workmen's Compensation Acts. However, no proposal for settlement was put forward; and the defendants, presumably acting on legal advice and apparently without notice to the plaintiff, discontinued

all payments under the Workmen's Compensation Act as from the week ending 19th March, 1944. Whilst I have little doubt that the object of defendants' solicitors in writing the letter of the 24th February, followed, as it was, by the discontinuance of the payments which the defendants had been making to the plaintiff, was to induce the plaintiff to accept a lump sum under the Workmen's Compensation Act, yet in my opinion these acts were entirely inconsistent with the agreement alleged by the defendants to have been entered into between the parties for the payment and acceptance of weekly payments by way of compensation under the Workmen's Compensation Acts. In these circumstances it is impossible for Mr. Fox to rely upon paragraph 12 of the Defence that the defendants were and have always been ready and willing to pay to the plaintiff the weekly compensation payable under the said Statutes.

I have stated above the most material portions, but by no means all, of the evidence upon which I have arrived at certain definite findings of fact. These I would summarize as follows :—

1. On 3rd December, 1943, when the plaintiff signed the form of election to accept compensation under the Workmen's Compensation Act and also signed receipts (on the same form) for two weeks' payments at the rate of 35*s.* 0*d.* per week, he knew that the money was being paid to him by the defendants in respect of their liability under that Act ; and, being received by him in such circumstances without demur or reservation of any kind, the payments must in my opinion be regarded as having been accepted by him on account of, and in discharge *pro tanto* of, such liability of the defendants. The same finding applies to all subsequent payments received by him up to and including the last which was made on 19th March, 1944.

2. At the time that he signed the form of election and until he had been advised by his solicitor, the plaintiff was unaware of the existence of any possible alternative remedy for damages for negligence or breach of statutory duty, which had certainly not been explained to him at the time that he signed the so-called

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"election" form; and, accordingly, he did not in my opinion fully appreciate either the meaning or the legal significance of the "election" which he purported to make. In particular, the plaintiff was unaware of the provisions of section 29 (1) of the Northern Ireland Act of 1927, and was ignorant of the fact that by acceptance of these payments he was either debarring himself from or prejudicing himself in respect of his claim at common law.

3. After having been informed by his solicitor as to his potential legal rights, and whilst his said solicitor was threatening proceedings by action in respect of negligence and breach of statutory duty, concerning which in the usual way he was doubtless collecting facts and obtaining the opinion of counsel, the plaintiff, voluntarily and without qualification or reservation of any kind, for a period of approximately two months continued to accept the weekly payments made to him under the Workmen's Compensation Act.

4. From 19th March, 1944—almost two months before the institution of the present proceedings—the defendants, of their own motion and without the consent of the plaintiff, discontinued, and have since withheld from the plaintiff, the said weekly payments under the Workmen's Compensation Acts.

The net point which I have to determine is whether in the foregoing circumstances the defendants are under any liability to the plaintiff in this common law action. The answer to this question depends upon the true construction of section 29 (1) of the Workmen's Compensation Act (Northern Ireland), 1927, and upon its application to the facts of the present case. The sub-section reads as follows:—

> "Where the injury was caused by the personal "negligence or wilful act of the employer or of some "person for whose act or default the employer is "responsible, nothing in this Act shall affect any "civil liability of the employer; but in that case "the workman may, at his option, either claim "compensation under this Act or take proceedings "independently of this Act; but the employer shall "not be liable to pay compensation for injury to a

"workman by accident arising out of and in the "course of the employment both independently of "and also under this Act, and shall not be liable to "any proceedings independently of this Act, except "in case of such personal negligence or wilful act "as aforesaid."

This section is in all material respects identical with section 1, sub-section 2 (*b*), of the Workmen's Compensation Act, 1897, which was re-enacted by section 1, sub-section 2 (*b*), of the Workmen's Compensation Act, 1906. Although, at first sight, the meaning and object of the section would appear fairly clear, I doubt if any section of the code has received more numerous or more varied and conflicting constructions. So much, indeed, has this been the case that in *Bennett v. L. & W. Whitehead, Ltd.* (1), Atkin, L.J., preferred to commence his judgment by an examination of the words of the section itself "unassisted by the multi-"coloured lights of the decisions." Thus it has been suggested, as, indeed, Atkin, L.J., himself did in the immediately following sentence, that the first words of the clause governed the entire operative part, so that it was only where the employer was in fact liable at common law to the workman that any question of an option arose; that is, in other words, that there must be an option between two real liabilities of the employer, and not between merely two chances of liability. The words "in that case," which introduce and qualify the option words of the section, he would have thought could only mean a case "where the "injury was caused by the personal negligence," etc., as contrasted with a case where it is alleged to have been so caused. Such a view is, however, as Atkin, L.J., points out, in direct conflict with the decision of the Court of Appeal in *Cribb v. Kynock Ltd.* (No. 2) (2), in which Cozens Hardy, M.R., after admitting that the language of the sub-section is not very happy, said (at p. 555) that "the true meaning of the Act is "that a workman cannot proceed to trial under the "Act and fail, and then proceed by common law "action, and also cannot proceed by common law

(1) [1926] 2 K.B. 380. (2) [1908] 2 K.B. 551.

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"action and, having failed in that action, then proceed "under the Act." The learned Master of the Rolls evidently considered, as did A. L. Smith, L.J., in *Edwards v. Godfrey* (1), at p. 337, that an option may be exercised although it has failed. Kennedy's L.J., opinion is to the same effect when he says (at p. 563) that the words "when the injury was caused" mean "when the injury was alleged to be caused." Atkin, L.J., on the other hand, as a matter of construction would prefer the view that the section, after declaring that nothing in the Act was to affect any civil liability of the employer, was only intended to protect the employer from paying compensation twice over under two alternative liabilities. Next we have a divergence of judicial opinion as to whether an option once exercised can be rescinded by, for example, withdrawing a claim for compensation or discontinuing an action before any decision has been given upon it. An affirmative answer to this query was given by a Divisional Court in *Rouse v. Dixon* (2), based upon the view that the intention of the Act was only to prevent the master from being liable to pay twice over. The Irish case of *Beckley v. Scott & Co.* (3) went even further than *Rouse v. Dixon* (2) for, by a majority decision in both the King's Bench Division and the Court of Appeal, in which emphasis was laid upon the words of the section being "shall not be "liable to pay" rather than "shall not be liable to "be sued," a workman whose claim under the Workmen's Compensation Act, 1897, was defeated by reason of a ruling that his case did not come within the Act was held not to be thereby prevented from instituting subsequent proceedings independently of the Act. What the section contemplated was, it was said, apparently a successful proceeding; the protection was confined to double payment. True, a workman must not have two proceedings pending at the same time; but an option was not final. Although *Beckley v. Scott* (3) was at first accepted by an English Court in *Rouse v. Dixon* (2), where a request for

(1) [1899] 2 Q.B. 333, 337.
(2) [1904] 2 K.B. 628.
(3) [1902] 2 I.R. 504.

arbitration, filed but subsequently withdrawn, was held not to constitute a bar to an action under the Employers' Liability Act, 1880, it was subsequently disapproved of by the English Court of Appeal in *Cribb v. Kynoch, Ltd. (No. 2)* (1), and other cases in which it was held that option could not be confined to option binding only in case of success. Recently, however, in Eire the Supreme Court in the case of *Irish Sugar Manufacturing Co. v. Flynn* (2) has re-affirmed its adherence to *Beckley v. Scott* (3). Yet, again, judicial opinion has differed as to when the option should be held to have been exercised. Kennedy, L.J., apparently considered in *Cribb v. Kynoch (No. 2)* (1), at p. 563, that it was when a decision was given either way that the workmen must be considered as having made his option ; but many other high judicial authorities do not consider an actual decision necessary —the making of a claim may in certain circumstances suffice—see *Harrison v. Wythemoor Colliery Co., Ltd.* (4). In this connection I may add that in *Bennett v. L. & W. Whitehead, Ltd.* (5), one finds three such eminent judges as Bankes, Scrutton and Atkin, L.JJ., differing in their opinions as to the meaning of the words " claim compensation under this Act," Scrutton, L.J., considering that it means making a claim which results in legal proceedings, that is, an arbitration, whilst Atkin, L.J., was of opinion that it merely means " intimate a claim to the employer " which may be either written or verbal in character. Bankes, L.J., on the other hand, appears to me to avoid this difficulty by holding that election is not determined by the mere making of a claim or by the institution of proceedings but by the doing of such an unequivocal act as compels the holding of election as a matter of law. At the same time he emphasises the view of Lord Blackburn in *Kendall v. Hamilton* (6), that there cannot be an election without knowledge of the right to elect.

I might proceed further upon these lines, indicating

(1) [1908] 2 K.B. 551, 563.
(2) 64 I.L.T.R. 73, 78.
(3) [1902] 2 I.R. 504.
(4) [1922] 2 K.B. 674.
(5) [1926] 2 K.B. 380.
(6) 4 A.C. 504, 542.

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the various trains of judicial thought; but to do so would not solve my problem in the present case—rather, by reason of divergence of opinions, would it only increase my difficulties. There is a further reason for not doing so, namely, that there is no plea on the file which in express terms alleges that the plaintiff exercised his option, or, in other words, elected to claim compensation under the Act. The plea contained in paragraph 11 is that the defendants prior to the institution of action admitted their liability to pay compensation to the plaintiff under the Workmen's Compensation Acts, and that the plaintiff accepted weekly payments in respect of the compensation payable to him as aforesaid. On the facts I hold against the establishment of the first part of this plea. It is negatived by the defendants' solicitors' letter of 24th February, 1944, and the subsequent discontinuance of weekly payments. There cannot be a unilateral agreement. The plaintiff cannot be held bound by the defendants' alleged admission of liability, which, though apparently made at one time, was repudiated or, at least, dishonoured by them before the plaintiff instituted the present proceedings.

The second portion of the plea is that the plaintiff accepted weekly payments under the Workmen's Compensation Acts and presumably that he is bound thereby and debarred from recovery of damages at common law. This plea is based on the further words of section 29 which immediately follow the option clause, and are separated from it only by a semi-colon. They read as follows :—" but the employer shall not " be liable to pay compensation . . . both inde- " pendently of and also under this Act." None of the cases to which I have already referred was decided on this part of the section though it is naturally referred to in some of the judgments. The actual decisions were based on the doctrine of election. Indeed, the first reported case which I find in which the decision rested entirely on this second clause or, as it is called, " second limb " of the section is *Perkins v. Stevenson & Sons, Ltd.* (1), and it is somewhat

(1) [1940] 1 K.B. 56.

remarkable that this volume of the Law Reports should contain the reports of three other cases in which reliance was placed upon this second limb of the section by defendants who were sued at common law or under the Employers Liability Act, 1880, after payments had been made by them and accepted by the plaintiffs under the Workmen's Compensation Act. In *Perkins' Case* (1), the plaintiff applied for and was paid two weeks' compensation under the Workmen's Compensation Act, 1925. Subsequently he obtained the assistance of a solicitor who wrote claiming that the payments already received and to be received had been and would be received by the plaintiff without prejudice to any remedy outside the Act. This view was not accepted by the defendants, but the plaintiff continued to receive the payments and to give unqualified receipts. In these circumstances in an action at common law and under the Employers' Liability Act, 1880, the Court of Appeal held against the plaintiff on the twofold grounds :—(1) That as he had claimed and been paid compensation under the Act his employers were not liable independently of it ; and (2) that, by continuing to receive compensation and to give unconditional receipts when he must have become aware of his right to elect, he must be taken to have exercised the option conferred by the sub-section by electing to take compensation under the Act. The Court, whilst recognising that the mere making of a claim without knowledge of the existence of the right of choice will not amount to an exercise of the option, yet considered that the effect of the second limb of the section is to exempt the employer from liability to pay compensation both under and outside the Act. The employer was not to be made to pay twice over ; and as Sir Wilfrid Greene, M.R., said at p. 66 : " Where " the employer in response to a claim under the Act, " has made a payment of compensation under the Act, " that payment discharges once and for ever in whole " or *pro tanto*, the statutory liability under the Act."

Now in this case of *Perkins v. Stevenson* (1) it is to be noted that the payments which the plaintiff had

(1) [1940] 1 K.B. 56.

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received—£81—amounted to the full compensation to which he was entitled under the Act (see judgments of Sir W. Greene, M.R., at p. 61, of McKinnon, L.J., at p. 69, and of Finlay, L.J., at p. 71). A hypothetical case put by Sir Wilfrid Greene at p. 66 is also based on the compensation claimed having been satisfied "up to the hilt." It may be that the decision in this case can be justified on the ground that owing to full satisfaction having been made to the plaintiff under the provisions of the Workmen's Compensation Act, the plaintiff must be held to have exercised his option under the section finally and irrevocably, but on no other ground could I accept the decision. Thus I unhesitatingly take exception to one of the grounds relied upon by all the members of the Court in support of the decision—the absence of any machinery by which the money received as compensation could be set off against or deducted from the damages to be awarded to the workman at common law. The true view upon this point was in my opinion expressed by Goddard, L.J., in *Unsworth v. Elder Dempster Lines, Ltd.* (1), at pp. 673-4, this view being accepted at pp. 670-1 by McKinnon, L.J., and by Lord Greene, M.R., in *Young v. Bristol Aeroplane Co.* (2), at p. 300, two of the learned judges who had originally subscribed to the contrary opinion in *Perkins' Case* (3).

Immediately following the decision in *Perkins' Case* (3) came the case of *Selwood v. Townley Coal & Fireclay Co., Ltd.* (4)—also a decision of the English Court of Appeal consisting of Slesser, McKinnon and Du Parcq, L.JJ. Here also the decision of the Court was against the plaintiff, the sole grounds on which it was sought to distinguish it from *Perkins' Case* (3) being, first, that in it no claim for compensation had been made by the workman but he had simply accepted it when brought to him by his employers, and, secondly, that the jury had found that there was no election by the workman. The Court held that the absence of claim was immaterial when considering the second limb of section 29 (1). No importance appears to

(1) [1940] 1 K.B. 658.
(2) [1944] 2 All E.R. 293.
(3) [1940] 1 K.B. 56.
(4) [1940] 1 K.B. 180.

have been attached by the Court to the jury's finding of "no election" as this fact is not referred to in the judgments; and neither Slesser, L.J., nor McKinnon, L.J., mentioned the further important distinction between the cases—that the plaintiff had stopped taking the weekly payments under the Act whilst he was still gravely incapacitated so that it was impossible to say, as had been said in *Perkins' Case* (1), that the plaintiff's entire claim under the Workmen's Compensation Act had been satisfied. Du Parcq, L.J., did allude to it in a judgment in which on the authority of *Perkins' Case* (1) he expressed his concurrence with the other members of the Court; but I feel that I am doing no injustice to the learned Lord Justice when I say that he did so with much hesitation. At p. 187, after referring to *Perkins' Case* (1) and the decision there arrived at, he said that speaking for himself he was not at all sure that if he had not had the advantage of that authority he would have very readily seen that this result followed from the words of the Act of Parliament. After endorsing the words of the Master of the Rolls, Sir Wilfrid Greene, that the Legislature clearly meant that the employer shoudl not be made to pay twice over, he added significantly:—"I cannot "help feeling some doubt whether the Legislature "intended the result to follow, where a workman has "taken a comparatively small sum in part payment "of compensation, that even though he may be "prepared to account for it or return it he is not to "be permitted to bring his action for damages at "common law. I say that," he concluded, "in "justice to the learned judge (who had entered "judgment for the plaintiff) because I sympathise "with his difficulties, and I feel that I might, in the "absence of the authority which is before us, have "come to the same conclusion as that to which he "came."

In *Stimpson v. Standard Telephones & Cables, Ltd.* (2), which was an appeal from a decision of Hilberry, J., the Court whilst accepting, as it was bound to do, the authority of *Perkin's Case* (1), held in favour of the

(1) [1940] 1 K.B. 56. (2) [1940] 1 K.B. 342.

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plaintiff on the ground that she was a minor and that she was not debarred by a claim made by or by compensation paid through her father as such payments were not for her benefit. In the circumstances I need make no further reference to the case than to call attention to the passage in the judgment of McKinnon, L.J., at p. 357, to the effect that his inability in *Perkins' Case* (1) to see any legal ground on which the employers could claim back the £81 which they had paid under the Workmen's Compensation Act was one of the reasons that seemed to him conclusively to lead to the result in that case.

The last of these four cases is *Unsworth v. Elder Dempster Lines, Ltd.* (2), to which I have already referred, in which the Court of Appeal, consisting of Slesser, McKinnon and Goddard, L.JJ., allowed the appeal against the decision of Croom-Johnson, J., who had entered judgment for the defendants. Here again *Perkins'* (1) and *Selwood's Cases* (3) were distinguished, it being held that the injured workman who had accepted payments which he called "accident" money," did not know of his rights under the Workmen's Compensation Act until he consulted his solicitor and could not have exercised an election before that date, as there could not be an election without knowledge of the right to elect: and further that the correct inference from the facts in regard to the receipt of payments subsequent to that date was that they were made to and received by him without prejudice to his rights at common law. The judgment of Slesser, L.J., may be referred to at p. 668 for the purpose of establishing, if authority be necessary, that the onus in such an issue as the present is upon the employer. I already referred to the judgment of Goddard, L.J., for one purpose. I now refer to it for the further purpose of calling attention to p. 674 in which he says that it seems to him that section 29 is really designed, and he has no doubt its original intention was, to prevent the employer from being harassed by two legal proceedings, and to protect

(1) [1940] 1 K.B. 56.
(2) [1940] 1 K.B. 658.
(3) [1940] 1 K.B. 180.

him against the danger of having to pay twice over. In this connection I would only say that a verdict for the plaintiff in the present case would not offend in any way against such original intention, as there have been in fact no legal proceedings under the Workmen's Compensation Act, and in assessing damages under the common law claim full credit can be given for any payments which the plaintiff has already received.

The decisions in *Perkins* (1) and *Selwood's Cases* (2) had in my respectful opinion a most unfortunate result in the case of *Deane v. Edwards (H.F.) & Co., Ltd.* (3), which came before Lord Greene, M.R., Goddard and Du Parcq, L.JJ., from a decision of Wrottesley, J. The learned trial judge found that the employer had been guilty of negligence and breach of statutory duty and assessed the damages provisionally at £320; but he also held that as the employer in response to a claim under the Workmen's Compensation Act made by the workman's authorised agent, had made payments of compensation to the workman, the action at common law was barred. The Court of Appeal appear to have been faced with the problem of what they should do where the merits were altogether with the plaintiff because of the circumstances under which the first and subsequent payments to the workman were made but the law as established in *Perkins' Case* (1) and *Selwood's Case* (2) was against him. It is stated in the report that during the course of the argument in the Court of Appeal the parties came to terms, but as these terms resulted in the appeal being allowed with all costs in both courts and judgment for £750 as against the provisional assessment of £320, it is fairly clear that there were indications during the arguments that the Court was not sympathetically disposed towards the defendants' attitude in contesting the case as they were doing. This is fully borne out by the few general observations, as he calls them, which Lord Greene then made, in the course of which he also said that section 29 had caused a great deal of difficulty in construction but, as the law stands at present, if

(1) [1940] 1 K.B. 56.
(2) [1940] 1 K.B. 180.
(3) 34 B.W.C.C. 109, 183.

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the workman, whether or not he knows of his rights under the option which the section confers, can be made to agree to accept payments under the Workmen's Compensation Act as such, he is debarred thereafter from asserting a right at common law. He continues that insurance companies are perfectly well aware of the significance of that principle of the law and refers to it as giving them an opportunity for inducing the workman by shabby action to accept money as payments under the Act. He expressed the hope that any insurance companies who came to hear of what he said would take counsel and see that this sort of advantage would never in the future be taken. The other members of the Court expressed their concurrence with Lord Greene's observations but the most important words which fell from Goddard, L.J., are in my opinion those in which he says that he has never understood "why the fact that a small weekly payment "is accepted by a workman should debar him for "ever from pursuing his remedy at common law "when he may be entitled to a very substantial sum "of damages." The learned Lord Justice then calls attention to the four cases in the first volume of the Law Reports for 1940 which I have briefly reviewed, concluding with the important words:—"Perhaps "after the war the attention of the Legislature will be "directed to this matter and it may be considered "whether some statutory mitigation of this rigorous "legislation could not be introduced so that the "consequences to which I have referred may be "removed."

These observations of the learned judges had a result though it was somewhat different from that which they contemplated. Instead of the legislation which was called for, there issued from the Home Office a Circular Letter of 30th March, 1942, sent it is alleged to certain Insurance Companies in which reference was made to section 29, to the effect of the recent decisions to which I have referred, and to the strong criticisms made by the Court of Appeal in *Deane v. Edwards* (1) of the practice of Insurance Companies

(1) 34 B.W.C.C. 183.

in getting workmen to accept weekly payments which they pleaded as a defence to a common law action. The Secretary of State in the circumstances asked for an undertaking that such a defence would not be raised if such proceedings were commenced within three months of the accident—a period which was to be regarded as a minimum. The letter concluded with an intimation—I almost called it a threat—that unless such undertaking was given by employers and insurance companies amending legislation would be introduced. I regret that I must enter a strong protest against this method of procedure. Amending legislation may have been called for by the cases referred to, and the appropriate or necessary change in the law might have been advantageously effected by recognised constitutional means ; but I deprecate strongly this attempt to interfere with the absolute independence of the Courts and of the rights of litigants in such Courts by this exercise of Departmental Government control. I should have preferred not to have had to make this reference, but I have had no alternative ; for an effort was made before me by Mr. Curran on behalf of the plaintiff to rely upon some sort of implied or, as he called it, gentleman's agreement based on the terms of the Home Office Circular, and it was urged that the pleading of paragraph 11 of the defence was a violation of the terms of this agreement. This attempt, however, completely failed ; for, apart from the fact that it was not specially pleaded, as it should have been, in the reply, all efforts by Mr. Curran to ascertain the name of the insurance company in the present case or to establish that they were parties to such a gentleman's agreement were unsuccessful. As further obstacles in plaintiff's way, I may add that the present proceedings were not brought within three months of the accident, and that, in any event, it is Messrs. John Howard & Co., Ltd., not their Insurance Company, who are defendants in this action.

There are two other cases to which I must refer. The first is the decision in the Scots Courts of *Brown v. Wm. Hamilton & Co.* (1), in which Lord Patrick

(1) [1943] Session Notes 82.

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delivered a most helpful and closely reasoned opinion. It is unnecessary to refer to the facts at length. Suffice it to say that the pursuer in that case signed a Workmen's Compensation Act receipt form and received several payments which Lord Patrick held he knew perfectly well was "compensation money under the "Act." Subsequently he learnt for the first time from his solicitor that there was such a thing as liability on the part of an employer at common law. Until then he did not know that in the circumstances of his accident an action would lie at common law against the defenders. Acting upon the advice which he received, he refused to accept further payments under the Workmen's Compensation Acts. Lord Patrick, after referring to certain earlier Scots cases in which he pointed out that the second part of section 29 (1) of its statutory predecessors had not for the most part been the subject of separate treatment, went on to say that it had been assumed rather than stated that the second part of the sub-section had no effect independent of, and different from, the first part, and in particular that it had no effect restrictive of the right to elect conferred by the first part ; as Lord President Clyde had put it in *King v. The Edinburgh Collieries* (1), the second part of the sub-section was exegetical of the first part. Lord Patrick then referred to the *Perkins*' (2) and *Selwood* (3), Cases which had given rise to the arguments which had been addressed to him—cases which were of course not binding on him and which were contrary to the current of authority in Scotland and in his opinion to the true intent of the Act of 1925 and to the proper construction of sub-section 29 (1). The workman's older rights at common law were, he said, expressly kept alive by the first part of section 29 (1) and its statutory predecessors but the workman was told that he must elect between the old and the new rights. The rights were to be "at his option" which necessarily involved a choice between known things. The decisions in the English cases involved that the second part of the sub-section detracted from

(1) [1924] S.C. 167.
(2) [1940] 1 K.B. 56.
(3) [1940] 1 K.B. 180.

the earlier express saving of the valuable rights at common law. It was involved in the argument addressed to him and based on these cases that if an employer tenders one week's payment and the workman accepts it knowing it to be tendered under the Act, the workman thereby loses any rights he may have under the Employers' Liability Act and at common law, notwithstanding he did not know he had any rights independent of the Act or that he had an option. The Workmen's Compensation Acts were, he said, remedial statutes, and ought, if reasonably possible, to be construed as conferring rather than restricting benefit. For all these reasons, he concluded, the words of the second part of the sub-section can receive adequate effect if one regards them as only exegetical of the first part or, put in another way, if one regards the first part of the sub-section as defining the rights of the workman and the second part as defining, perhaps unnecessarily, the resulting rights of the employer.

The last case on the subject is *Young v. Bristol Aeroplane Co., Ltd.*, (1) in which an effort was made by the calling together of a full Court of Appeal of six members to review the whole law on this vexed question ; but the attempt failed as it was held that a full court of the Court of Appeal has no greater powers than any division of the court. One passage only—and in its terms it appears to me a very significant one—I cite from the judgment of Lord Greene, M.R., at p. 297 :—" Our attention," he said, " was " called to the opinion expressed by Lord Patrick in *Brown v. Wm. Hamilton & Co., Ltd.* (2). In that " opinion Lord Patrick referred to *Perkins' Case* (3) " and *Selwood's Case* (4), and refused to follow them " because he thought they were contrary to the current " of decision in Scotland and to the true intent of the " Workmen's Compensation Act, 1925, and to the " proper construction of section 29 (1) of that Act. " His criticism deserves the most careful consideration ; " but, even if we were inclined to accept it, we should

(1) [1944] 2 All E.R. 293.
(2) [1943] Sessions Notes 82.
(3) [1940] 1 K.B. 56.
(4) [1940] 1 K. B. 180,

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" not by reason of it, be entitled to ignore the decisions " in *Perkins' Case* (1) and *Selwood's Case* (2), which, " for reasons which we now proceed to state, are in our " opinion binding on us and must therefore be followed." It would appear from the report of *Young's Case* (3) that the Court had only before it the very brief report of Lord Patrick's opinion contained in 1943 Sessions Notes at p. 82. I shall only say that the closer acquaintance with Lord Patrick's opinion provided by a perusal of the full report contained in the *Scots Law Times* adds materially to its convincing character.

Unbound as I am by either the English or Scots cases, but naturally paying the deepest respect to both, I must say that I accept the decision in *Brown v. Wm. Hamilton & Co.* (4) in preference to the English cases, which were based in part upon a line of reasoning which is now admitted to be wrong, namely, the supposed inability to set off or allow credit in the assessment of damages for payments already made to the injured workman. In my opinion it was not the intention of the Legislature to divide the sub-section, as it were, into two parts, treating the words " but the " employer shall not be liable to pay compensation . . . " both independently of and also under this Act " as what has been called " the second limb " affording a protection to the employer independent of and distinct from that provided by the option or election clause. In my opinion the exercise of a valid and binding election by the workman, made with that knowledge which such an election involves, is essential to the establishment of a defence under the section, the words negativing liability to double payment being regarded as either explanatory or consequential. To hold otherwise would, in my opinion, violate the provision that nothing in the Act should affect any civil liability of the employer. It would, indeed, be a very unfortunate example of the draftsman's art if the Legislature intended by the second half of the section, which relates to the *employer's* legal position, to add a further obstacle to the *workman's* rights,

(1) [1940] 1 K.B. 56.
(2) [1940] 1 K.B. 180.
(3) [1944] 2 All E.R. 293.
(4) [1943] Sessions Notes 82.

which, by the first part of the section, were only restricted by the necessity for his making an election between the two remedies of (1) claiming compensation under the Act, or (2) taking proceedings independently of it.

In the circumstances proved in the present case I hold :—

(1) that the signing by the plaintiff of the receipt form purporting in terms to make an election did not in law constitute a valid and final election by reason of his want of knowledge of his alternative rights and his ignorance of the provisions of section 29 (1) of the Act ;

(2) that such election was not made final or binding upon the plaintiff by the subsequent acceptance by him of weekly payments before he was informed by his solicitor as to his rights ;

(3) that I have no proper or sufficient evidence as to when the plaintiff was so informed as to his rights, and the delay in issuing the writ until 10th May, 1944, suggests that his solicitor had great difficulty himself (and possibly also so had his counsel) in forming an opinion upon the matter ;

(4) that even if it be assumed that the plaintiff was sufficiently informed as to his rights when his solicitor wrote the letter of 21st January, 1944, I decline to bind him to an election by his subsequent acceptance of the few subsequent weekly payments receipted on new forms which contained no declaration of election, and which were made by employers whose solicitors had written expressing doubts as to the plaintiff being entitled to recover under the Act, and who followed up this intimation with a discontinuance of the payments some seven weeks before the institution of the present proceedings. It does not appear to me reasonable or proper that I should now hold the plaintiff bound to accept compensation, liability for which they had themselves repudiated.

In my opinion the plaintiff is entitled to damages

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which, including the special damage proved, I assess at the gross sum of £1,500, and after giving credit for the weekly payments which he received, amounting in all to £31 10*s.* 0*d.*, I direct judgment to be entered for him for the sum of £1,468 10*s.* 0*d.* with costs.

ANDREWS L.C.J.

Solicitor for the plaintiff: *A. P. Ward.*
Solicitors for the defendants: *C. & H. Jefferson.*

J. McC.

THE PIG MARKETING BOARD (NORTHERN IRELAND), APPELLANT;

COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

K.B.D. 1944.

Dec. 12, 13 1945. Jan. 17.

Revenue—Income Tax—Scheme framed by Ministry of Agriculture for the more efficient production and marketing of agricultural produce—Charity—Income of invested funds—Exemption—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sec.* 37, *sub-sec* 1 (*b*).

The appellant was a body corporate constituted by a scheme framed by the Ministry of Agriculture for Northern Ireland, under the power conferred by the Agricultural Marketing Act (Northern Ireland), 1933, to frame a scheme regulating the marketing of any agricultural product, including pigs, in any case where the Ministry is satisfied that such a scheme is necessary for the more efficient production and marketing of that product. It was required by the Act that such a scheme should be administered by a Board (to be constituted by the scheme) certain members of which should be elected by producers of the regulated product. The appellant was empowered by the scheme to buy and sell pigs, to produce bacon and other pig products, to establish slaughter-houses and to supply pig producers with anything required for the production of pigs. By the scheme the appellant was also empowered to borrow money and to levy contributions from pig producers, was required to pay into a fund all moneys received, and was given power to invest any money standing to the credit of the fund, and to employ servants and officials subject to the approval of the Ministry of Agriculture. Under the scheme any moneys standing to the credit of the fund which were not required for the operation of the scheme were to be distributed among pig producers, but by the Bacon Industry Act, 1939, it was provided that they should be applied for the benefit of the pig producing industry.

At the time the Board was established the pig producing industry was in a depressed state and the operations of the Board conferred substantial benefit on it with consequential benefit to the general trading community. An assessment to income tax on the income of its invested funds having been made, the Board claimed exemption on the ground that it was established for charitable purposes only.

Held, that the Board was not established for charitable purposes only, and therefore, that it was not entitled to the exemption claimed.

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THE PIG MARKETING BOARD (NORTHERN IRELAND), Appellant; COMMISSIONERS OF INLAND REVENUE, Respondents.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts after the hearing by them of a claim by the appellant for exemption from income tax in respect of income from investments on the ground that the Board was established for charitable purposes only.

The facts are stated in the judgment.

Curran, K.C., and *Patton* for the appellants.

Fox, K.C., and *Nicholson* for the respondents.

MACDERMOTT J.

MACDERMOTT J.: In this case The Pigs Marketing Board (Northern Ireland) appeals by way of case stated from the decision of the Special Commissioners dismissing its claim to exemption from income tax in respect of its investment income for the seven years ending 5th April, 1942.

This claim was made on the ground that the Board was a body of persons established for charitable purposes only and as such was entitled to exemption under section 37 (1) (*b*) of the Income Tax Act, 1918.

No question as to the application of the income arises and the only point for determination is whether, in law, the Board is "established for charitable "purposes only."

The Board is a body corporate constituted in the year 1933 by a scheme framed by the Ministry of Agriculture for Northern Ireland pursuant to the provisions of the Agricultural Marketing Act (Northern Ireland), 1933.

The most important of these provisions is that contained in the first paragraph of sub-section (1) of section 1 which reads "a scheme regulating the "marketing of an agricultural product may be "framed by the Ministry of Agriculture (in this Act "referred to as 'the Ministry') for application to "Northern Ireland, or to some part thereof, in any "case where the Ministry is satisfied that such a "scheme is necessary for the more efficient production "and marketing of the said agricultural product."

For the purposes of this enactment the expression "agricultural product" includes pigs and pig products. Several of the other provisions of this statute may also be noted. Sub-section (4) of section 1 enables the Ministry to amend or to revoke a scheme. Section 2 provides, *inter alia*, that every scheme must constitute a board, certain members of which are to be elected by registered producers of the regulated product. Sub-section (1) of section 14 empowers the Ministry to make regulations for, *inter alia*, giving full effect to the Act and sub-section (2) of that section provides that "subject to any directions which may "be contained in regulations made under this section, "it shall be the duty of Boards administering schemes "under this Act to exercise their powers in such manner "as appears to them to be necessary for securing that "the regulations are not contravened."

The Pigs Marketing Scheme (Northern Ireland), 1933, which established the Board, describes itself as a scheme "regulating the marketing of pigs." It has been modified from time to time. The modifications tended to reduce the powers of the Board as further provision was made by Parliament and the Ministry for the development of the pig and bacon industries of Northern Ireland. Thus, by section 5 of the Agricultural Marketing (Pig Industry) Act (Northern Ireland), 1934, the fixing of prices and terms of sale ceased to be a function of the Board and became the duty of the Pig Industry Council, while by the Bacon Industry Act of 1939—a statute which conferred extensive powers on the Council and the Ministry with a view to the better organisation of the bacon industry and the system of pig supply—certain provisions of the 1933 scheme which gave the Board a wide control over producers, including such powers as the determination of the descriptions and quality of pigs which a producer might sell and the persons to whom he might sell, were repealed.

I do not consider, however, that these changes affect the question of liability to tax during the period under review and it will be unnecessary, therefore, to cumber this judgment by attempting to trace them in

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detail or to describe the relationship of the different bodies and agencies, including the Board, which during this period were entrusted by Parliament with the task of improving conditions in this particular branch of agriculture by the administration of a complex and interwoven series of statutes and orders. But throughout the course of its active operations the Board retained very considerable powers and certain of these may be mentioned as indicative of its sustained characteristics, it being borne in mind that these continuing powers, in conjunction first with others possessed by the Board, and later with those conferred on other bodies such as the Council and the Ministry, were a necessary part of the elaborate machinery which was developed for the regulation and improvement of the pig industry as a whole.

The Board was empowered to buy and sell pigs; to produce bacon and other pig products; to establish slaughter houses for that purpose; to supply registered pig producers with anything required for the production of pigs; and to co-operate with others in the exercise of any such powers. The Board was also empowered to borrow and to levy contributions from pig producers. Money received must be paid into what is known as "the fund" and payments have to be made thereout. Money to credit of the fund may be invested and it is to the income of investments so made that this appeal relates. Separate trading and administrative accounts are to be kept. Under the 1933 scheme these were to be audited by professional accountants. Since the passing of the Bacon Industry Act, 1939, they must be submitted to the Comptroller and Auditor-General. The Board has power to employ officers and servants but this is subject to the approval of the Ministry. It may further be noted that the Act of 1939 as well as making other provision for the discharge of certain of the functions which it took from the Board, also altered the Board's powers in respect of its surplus funds. Under the scheme these were to be distributed among producers. By the Act of 1939 they are to be applied "for the benefit of the pig producing industry in such "manner as the Ministry of Agriculture may by order "direct."

This summary will suffice to show that, while the Board exhibits several features distinguishing it from an ordinary commercial undertaking, it was clearly established as a trading concern. This, however, is not conclusive. Trading may be the means to a charitable as well as to a commercial end; and there can be no doubt that the trading powers of the Board were intended to accomplish something beyond the field of normal commerce.

Counsel for the appellant urged that the Board was established for a purpose beneficial to the community and so came within the fourth category mentioned by Lord Macnaghten in his well-known classification of charitable trusts in *Commissioners for Special Purposes of Income Tax v. Pemsel* (1). They further contended that the Board was and, indeed, could only have been established to promote what section 1 (1) of the Act of 1933 speaks of as the more efficient production and marketing of an agricultural product; that this was obviously a purpose for the advancement of agriculture and that such a purpose was charitable in law—a proposition for which they cited the decision of the Court of Appeal in England in *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* (2).

There are elements in these arguments with which I am not disposed to quarrel. The Special Commissioners have found facts which indicate that the operations of the Board resulted in substantial relief to a depressed industry with consequential benefit to the general trading community; and it may reasonably be said that the scheme and the legislation under which it was framed aimed at producing such a result. There is also much to be said, on the authorities, for the view that the advancement of agriculture is, in itself, a charitable purpose.

I have, however, come to the conclusion that, notwithstanding the ingenious arguments advanced on its behalf, the Board was not established for charitable purposes only and is, therefore, not entitled to the relief claimed.

Purposes undoubtedly beneficial to the community

(1) [1891] A.C. 531, 583. (2) [1928] 1 K.B. 611.

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are not necessarily charitable. That has been established by a long line of authorities of which I need mention only one—*Attorney-General v. National Provincial Bank* (1). As Viscount Cave L.C. said in that case, at p. 265 of the report, "My Lords, it "has been pointed out more than once, and particu- "larly by the members of the Court of Appeal in *In* "*re Macduff* (2), that Lord Macnaghten did not mean "that all trusts for purposes beneficial to the community "are charitable, but that there were certain charitable "trusts which fell within that category; and accord- "ingly to argue that because a trust is for a purpose "beneficial to the community it is therefore a charitable "trust is to turn round his sentence and to give it a "different meaning. So here it is not enough to say "that the trust in question is for public purposes "beneficial to the community or for the public "welfare; you must also show it to be a charitable "trust." Accordingly, the purposes of the Board cannot be held charitable merely on the ground that they are for the public benefit.

Counsel for the appellant, however, supported this argument with another. They said that, in addition to being for the public benefit, the real purpose of the Board was the improvement of a wide and important branch of agriculture and they relied upon the decision in *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* (3) as establishing that this was a charitable purpose and none the less so because the means of achieving it might incidentally confer benefit upon individual pig producers.

In dealing with this argument I shall assume in its favour that the Board's purposes include the advancement of agriculture and that, in as far as this is so, they are, in their legal nature, charitable. But having made this assumption the question remains whether the purposes of the Board are charitable *only*. I do not think they are. The benefits conferred upon pig producers cannot in my opinion be left out of account as being merely incidental. I think there can be little

(1) [1924] A.C. 262.
(2) [1896] 2 Ch. 451.
(3) [1928] 1 K.B. 611.

doubt that one of the purposes for which the Board was established was to rescue pig producers from the plight into which their particular industry had fallen. The purpose of the scheme, as expressed in the statute under which it was framed, was to regulate the marketing of pigs in order to obtain more efficient production and marketing. I do not see how this purpose can be isolated from the direct effect which its implementation was bound to have on those most vitally concerned—the producers of the regulated product. I consider that the constitution of the Board fully justified the view which, as appears from its earlier annual reports, the Board in fact adopted, namely, that it was under a duty to promote the prosperity of producers. Their interests were recognized by Parliament as sufficiently specific and important to justify representation on the Board; and, on the whole scheme, their contributions must, I think, be regarded as payments made by a class which it was contemplated would obtain special benefit rather than as a tax imposed for the service of a wider community.

This view brings me to the series of decisions establishing that a professional body whose purposes benefit the community in a manner which is charitable and also advance, not incidentally but directly, the interests of the profession concerned, is not established for charitable purposes only. I need not go through the cases. The leading authorities will be found most helpfully collected and reviewed in the judgment of Hanna J. in *Pharmaceutical Society of Ireland v. Special Commissioners of Income Tax* (1).

In my opinion no distinction in principle can be drawn between the promotion of the interests of a particular commercial class and the promotion of the interests of a particular profession and I, therefore, come to the conclusion that, even on the assumption I have made, the purposes of the Board are not charitable *only*.

To preclude misunderstanding I should perhaps add that this assumption is not to be taken as

(1) [1938] I.R. 202.

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indicative of an opinion that some of the Board's purposes are charitable. I am not at all certain that any of them are charitable. My inclination, as at present advised, would be to say, as Lawrence L.J. said in the *Medical Council Cases* (1), "When the "object and functions of such a body as this are "considered, it seems to me to be far remote from "anything which comes within the spirit or intention "of the Statute of Elizabeth." In this case, however, a conclusion to that effect might well involve the questions whether (as the Statute of Elizabeth and the observations of Lord Eldon in *Morice v. Bishop of Durham* (2) would appear to suggest) the nature of a legal charity must be such as to permit of its administration and enforcement by the Court should occasion arise; and, if so, whether the purposes of a body such as the Board involve policy and governmental control to a degree which would make the intervention of the Court impracticable. As these matters were not explored in argument before me, I do not propose to decide them or to express a final opinion on the applicability of the dictum of Lawrence L.J.

The conclusion I have already reached—that the purposes of the Board are not charitable *only*—suffices to determine the appeal which must be dismissed with costs.

Solicitors for the appellants: *G. L. MacLaine & Co.*
Solicitor for the respondents: *F. C. MacNeice.*

J. McC.

(1) 13 T.C. 819, 851.

(2) 10 Ves. 522.

LARMOUR v. BELFAST CORPORATION.

C.A. 1945.

Feb. 20, 21. May 15.

Master and servant—Injury to servant—Dangerous system of working —Negligence of master.

The plaintiff was the widow of a man who was employed in the defendants' gasworks, and who was killed accidentally when working there. Part of the deceased man's duties consisted in drawing dampers so as to increase or reduce draught; the dampers were placed at different levels each served by a platform from which the draught could be regulated by the workmen using damper rods of iron or steel about six feet long and weighing about seven and a half pounds. The access to the platforms was by vertical steel ladders up and down which the men had to go from time to time, carrying damper rods. The deceased man was killed by falling from one of the ladders. The only person who saw the accident happen was A., a fellow-workman, under whom the deceased man worked; he saw the deceased man falling backwards from the ladder; he could not say whether the man was ascending or descending the ladder when he fell, he did not see anything in his hand before he fell or while he was falling, nor see anything falling with him. After the accident a damper rod was found at the bottom of the ladder from which the man fell. A few minutes before the accident happened A. had requested him to get a damper rod for use on the platform towards which the ladder led. There was a conflict of evidence as to whether the ladders were a dangerous means of getting to and from the platforms for a man carrying a damper rod. The deceased was a healthy man, fifty-seven years of age.

At the trial of an action for damages for negligence the Trial Judge found that the defendants had a system of working which was dangerous, that when the deceased man fell from the ladder he was descending and was carrying a damper rod, that his fall was caused by the failure of the defendants to provide a reasonably safe system of working, and that the plaintiff was entitled to damages.

Held, by the Court of Appeal (Murphy, L.J. and Black J., Babington L.J. dissenting), that there was sufficient evidence to sustain the finding.

APPEAL from Andrews L.C.J.

The facts are stated in the judgment of Black J.

Curran, K.C., and *Copeland* for the appellants.

Chambers, K.C., and *Nicholson* for the respondent.

Cur. Adv. Vult.

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BABINGTON L.J.

BABINGTON L.J.: The plaintiff in this case is the widow of James Larmour deceased, a workman, and sues on behalf of herself and her three children claiming to recover damages from the defendants, her husband's employers, for negligence and breach of statutory duty as a result of which it is claimed that the deceased suffered injuries from which he died on the 26th February, 1944.

The claim for breach of statutory duty, based on the Factories Act (Northern Ireland), 1937, was in part withdrawn at the trial and in part decided in the defendants' favour and was not relied on in this Court, so that the only questions to be decided on this appeal are whether the Lord Chief Justice was right in holding (*a*) that the defendants were guilty of negligence, and (*b*) that this negligence caused the death of James Larmour.

The defendants own and operate a gas plant at Ormeau Avenue, in the City of Belfast, in which James Larmour was employed as a labourer.

Part of this plant consists of a vertical circular retort fitted with dampers to regulate the draught, and these are placed at different levels up the face of the structure. Each damper has a platform opposite it from which it can be regulated by workmen who perform the operation by hand, using damper rods which have to be conveyed to the platforms somehow or other.

The access to these platforms is by a vertical steel ladder up and down which the workmen have to go to regulate the dampers and up and down which from time to time the damper rods have to be carried.

These rods are seven and a half lbs. weight and six feet long on an average and they have a loop handle at one end and a crook or bend at the other end with which to operate the damper. It was stated before us that they are five-eighths of an inch in diameter, a figure calculated from the plan prepared and proved by Mr. Parkinson, the plaintiff's first witness.

The complete layout of this retort does not appear in the evidence which relates only to the first two platforms counting from the ground up. These are the

producer platform, which on the evidence of Mr. Parkinson is 16 ft. 11 ins. from the ground, and the first platform which is 7 ft. 3 ins. above it and 24 ft. 2 ins. from the ground.

The accident which resulted in the death of the deceased seems to have occurred while he was coming down from the first platform to the producer platform, and I think the plaintiff's advisers were right in confining their evidence to this portion of the plant.

The Lord Chief Justice inspected the gas works on two occasions and some facts appear in his judgment which were not sworn to in evidence. We are not told exactly what passed at these visits but there appears to have been a discussion between Mr. Heslip, the defendants' manager, and the Chief Justice on the first occasion and between Mr. Parkinson, the plaintiff's engineer, and the learned Judge on the second occasion, and some of the facts then elicited have been embodied in his judgment.

It has not been argued in this Court that the retort platforms and ladders were improperly constructed or maintained, and therefore the question of liability depends solely on whether the defendants were negligent in not taking reasonable precautions for the safety of their workmen when using these ladders and platforms, and if so, whether the deceased's death was due to such negligence.

The cause of the death must therefore be first ascertained.

The only person who saw this accident was William Robert Armstrong, a carbonising assistant in the Gas Works. He had been in this job for four years and the deceased worked under him. The first thing that attracted his attention was that he saw the deceased falling backwards off the 7 ft. 3 in. length of ladder between the producer and first platforms. The deceased was about five feet from the producer platform when he fell so that his feet must have been on the third or fourth rung and his waist on the upper platform level, and he hit the guard rail of the lower platform and fell outside it to the ground some twenty feet below and was killed. Armstrong could not say

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if he was going up or down when he fell, he did not see anything in his hand before he fell or while he was falling, nor did he see anything fall along with the deceased, but after the accident a damper rod was found on the producer platform at the bottom of the ladder, and the Lord Chief Justice has drawn the inferences that he was carrying this rod down from the first platform to the producer platform and that as he fell he parted company with it, the rod falling off the producer platform and the deceased falling outside this platform to the ground.

This is all the evidence I can find as to how the accident happened other than a statement said to have been made by Armstrong in answer to a question put to him by the Lord Chief Justice. According to the appeal books Armstrong said: "I have requested "him to get a damper rod" but the Lord Chief Justice in his judgment says that Armstrong admitted to him that he *had* requested the deceased "*only a few minutes* "*before*" to get a damper rod. We have seen the original note and the word is not clear. It appears to have been taken down and subsequently altered either from "had" to "have" or "have" to "had." Being in doubt as to which is correct we have consulted the Lord Chief Justice, who says that having examined his original note he is satisfied that the word was originally "have" and that it was subsequently altered into "had" and he says: "This "correction I can only assume was made at the time."

Accepting this version as I do the answer obviously relates to some period in or about the time of the accident. The question to which the statement is an answer is not set out and the time to which the answer refers cannot therefore be fixed. It may have been before going to work or immediately before the accident, or indeed it may have been the day before. The words "only a few minutes before" do not appear in the notes but I will assume that the words, or words to the same effect, were used by Armstrong and that the statement relates to the time immediately before the accident and that Armstrong received a a specific order to get a damper rod.

I also assume in the plaintiff's favour that this means "get a damper rod and carry it up or down "some part of the vertical ladder," which only reinforces what Armstrong had already said, namely that the men carried the damper rods up and down the ladders in the course of their employment. Upon this version of Armstrong's evidence the Chief Justice bases the inference that the deceased had ascended to the first platform for the purpose of getting a rod, was on his way down again with it in his hand when he slipped or fell, and the statement is only of importance in so far as it supports this inference, it being admitted that the workmen had to carry these damper rods up and down the ladder in the performance of their duties. On examination Armstrong says: "I had just told "him we would regulate dampers on producer platform "for which we would require rods," but it is not clear whether this statement means that Armstrong told the deceased that a rod would be required or whether it is merely a reflection by Armstrong that the deceased must have known that a rod would be required.

The inference drawn by the Lord Chief Justice that the deceased procured a damper rod in obedience to Armstrong's order and was on the ladder with it in his hand when he fell therefore depends almost entirely on whether the doubtful word was "have" or "had," and though I accept the learned Judge's version of the evidence I would have approached the inference itself with less confidence having regard to this difficulty over a question put by the Judge himself and not by counsel if it had been necessary to deal with it. On the facts the case does not turn on the inference to be drawn from this piece of evidence, for assuming that the deceased was carrying a rod when he fell this fact is not sufficient to support the further inference that this was the cause of his fall. How he was carrying the rod and how it caused him to fall have not been established. The Lord Chief Justice has found that he was carrying it in one hand and grasping the side of the ladder with the same hand. This is an inference which can only be drawn by shutting one's eyes to a number of other possibilities equally probable,

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and even if it could be supported on the facts it is not sufficient in itself to establish either directly or by way of further inference that the possession of the rod caused the fall.

It is all conjecture, speculation and surmise and more evidence than has been forthcoming in this case would be required to establish any connection between the fact which it is claimed must be inferred and the only real fact found in this case, namely, that the deceased fell from the ladder.

It was strenuously argued that these findings of the Lord Chief Justice are findings of fact and that we cannot review them. If the findings were findings of fact based on evidence, this would no doubt be correct, but when the facts found are based on inferences to be drawn from undoubted facts this Court is in as good a position as the trial judge to determine their issue, and if we think the judge was wrong we must reverse his decision.

The inferences which the Lord Chief Justice appears to have drawn in this case are :—1. That the deceased procured a damper under orders from Armstrong ; 2. That he was descending the ladder with the damper in his hand ; 3. That he was grasping the side of the ladder and the damper in one of his hands, which hand not being specified ; 4. That this either caused him to lose his hold and fall or prevented him from recovering from a slip due to some other mishap, and in my opinion they are not justified on the facts.

I cannot say that I am satisfied as to any of them, and accordingly I think the finding of fact which is based on them cannot be supported.

To warrant an inference that possession of a rod caused the deceased to fall would require more evidence than has been given in this case having regard to the length of time during which this plant has been in operation and the fact that these rods were carried up and down the ladders by workmen for some twenty-five years without accident. And if we are to indulge in speculation many reasons could be suggested for the deceased's fall other than the possession of the rod, all of which would be equally consistent with the evidence given at the trial.

Assuming, however, that the deceased was carrying this rod and that it caused his fall, the further question then arises as to whether this fall was the result of any negligence or want of care on the part of his employers.

The statement of claim charges general negligence in the arrangement and control of the defendants' Gas Works, as a result of which the deceased fell from the ladder, and the particulars specify " Failing to provide " a safe system of working " and elaborate this main heading by specifying a number of matters in which the Gas Works and the methods employed therein were alleged to be defective. These have now been reduced to one item found by the Lord Chief Justice, namely, that " There was in operation on the de- " fendants' premises a defective system in regard to " the removal of damper rods from one platform to " another."

A great number of authorities were cited to us in which the words " *a safe system of working* " are used, but having examined them all I think these words are only used as a convenient way of describing the duty of employers in a certain class of case and not as an extension of their liability for negligence, namely, that the master is bound to take all reasonable precautions for his servants' safety. Failure to take such precautions may arise from defective plant, failure to provide the servants with safe and adequate tools, failure to provide proper working conditions, and in many other ways, but the facts must always be examined to ascertain what is the precise act of negligence established before it can be said to amount to a failure to provide a proper system of working.

The act of negligence relied on here and found by the Lord Chief Justice is that of requiring or permitting the workman to carry the damper rod up or down the ladder, and before deciding whether this be negligence or not, it is necessary to consider the measure of the employers' duty. Must they take precautions to prevent their workmen carrying these bars up and down the ladders ? Must they provide some other way of getting them up and down to the various platforms ?

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In my opinion they are under no such obligation upon the evidence given in this case. The Lord Chief Justice has satisfied himself that it is dangerous to carry these rods up and down the ladders, and I cannot avoid the conclusion that he so held mainly on what he observed when he visited the Gas Works. Robert Armstrong negatives it and he was the main witness for the plaintiff. The Gas Manager, James Heslip, negatives it and so does the fact that the Works have been immune from accident for twenty-five years. The Chief Justice does not throw any doubt on this evidence. The only witness as to the dangerous nature of the operation is Mr. Parkinson, a consulting engineer who gave evidence for the plaintiff and whose knowledge of this class of undertaking does not appear. In fact, he says on cross-examination : " Have not " inspected other premises. If in other Gas Works I " still think not safe. Does not affect me that no " accident for twenty-five years." He admits, however, that vertical ladders are in common use and indeed this is common knowledge and one cannot walk about any city or board any modern steamship without seeing or using them especially as a means of access to machinery, engine rooms or lower decks.

The weight of the evidence is in my opinion against him.

If the judgment in this case is right it follows that wherever there is a vertical ladder no workmen can be allowed to carry anything up or down it but that some alternative method of transport must be provided.

This is too sweeping a proposition. The employee has duties as well as his employer and within the bounds of those duties must take care of his own safety.

Here the rods had to be carried up and down the ladders. How many or how often or in what way does not appear. The Gas Manager, who was corroborated by Armstrong, says : " These men are accustomed " to doing this dozens of times a day. Possibly for a " week dampers may not require attention. Plant " working for twenty-five or thirty years and never " instance of this slipping off ladder before." " Work- " man uses method of bringing damper rod down that

" he thinks safest. I would not say there was a safest " method. If a man feels not safe we do not require " them to be carried they decide the shape and number " of rods and it is for them to decide. *We leave the* " *method to workman.*"

These last words contain the kernel of this case. Is it negligent for the defendants, who have provided an adequate plant, to leave the method of getting the damper rods up and down the ladders to the workmen, or must they provide the workmen with some alternative method of doing so ? In my opinion no such liability has been established. There is a whole range of duties which have to be performed by workmen, in discharge of which they must use their own discretion and take due care for their own safety and there is no evidence to show that this is not one of them. No general evidence was given as to men carrying tools, materials and other impedimenta up and down vertical ladders, but I have no doubt that this is done every day in numberless factories and works and by seamen, builders' labourers, painters and decorators and a host of other operatives, so that there must be ways of carrying gear up and down ladders which are relatively safe. Work would be seriously impeded if this were not so, and the proposition that the employer who orders or permits it to be done by the workmen in his own way is guilty of negligence is one that requries much clearer authority than is to be found in any of the cases cited to us.

We were invited by the defendants' counsel to hold that if we are of the opinion that the defendants were guilty of negligence in not providing some other method of transporting the damper rods, nevertheless the deceased was guilty of contributory negligence.

In my view of the facts the question of contributory negligence does not arise as there is no evidence as to how the accident occurred.

It may have been a mere accident which is always lying in wait for the unwary when using a ladder of this description or, indeed, any ladder. If, contrary to my view there is evidence, that the deceased was carrying a rod, his fall may have been due to some

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carelessness on his part in the way he carried it or to something other than mere possession of the rod, but until it is established by direct evidence or by clear inference how the accident occurred it is impossible to say whether it was due to the alleged negligence of the defendants or to some unascertained negligence on part of the deceased.

In my opinion there was no direct evidence given at the trial to justify the finding that the defendants were guilty of negligence and the inferences which the Lord Chief Justice has drawn from such evidence as was given cannot be supported.

Accordingly this verdict and judgment should be set aside and judgment entered for the defendants.

MURPHY L.J.

MURPHY L.J.: In considering the questions raised in the admirable arguments which have been addressed to us on this Appeal, it becomes necessary at the outset to consider "the rule of conduct of the Court of Appeal "when hearing an appeal on a question of fact from "the judgment of a Judge trying a case without a "Jury" (*vide* Lord Esher M.R. in *Colonial Securities Trust Co. Ltd. v. Massey and Others* (1)). Mr. Nicholson cited to us *Colonial Securities Trust Co. Ltd. v. Massey and Others* (1), and the speech of Lord Sankey L.C. in *Powell & wife v. Streatham Manor Nursing Home* (2). To these, I would add the judgment of Lindley M.R. in *Coghlan v. Cumberland* (3). In the present case there was a conflict of testimony on the question which the learned Lord Chief Justice decided in favour of the plaintiff. This is not a case in which the sole controversy is as to the proper inference to be drawn from admitted facts (as to which see Lord Halsbury in *Montgomerie & Co. v. Wallace-James* (4), and Holmes L.J. in *S.S. Gairloch* (5)), and I hold it to be well settled that we should only overrule the finding and judgment of the Lord Chief Justice if the appellants satisfy us that they were wrong.

Mr. Nicholson also contended, as a matter of

(1) [1896] 1 Q.B. 38.
(2) [1935] A.C. 243, 249.
(3) [1898] 1 Ch. 704.
(4) [1904] A.C. 73, 75.
(5) [1899] 2 I.R. 1, 18.

principle, that because the Lord Chief Justice, having heard the evidence, inspected the *locus in quo* on two occasions, we should be slow to review his decision on the facts, while Mr. Curran argued, contra, that such an inspection should not influence our decision, that it did not appear what facts affected the Judge's mind on these inspections and that it was undesirable that by such inspection the Judge should, in effect, constitute himself a witness whose evidence could not be tested on cross-examination. It was not contested and could not be successfully contested that the Trial Judge was entitled to view the *locus in quo ;* having regard to the suggestions made by Mr. Parkinson by way of safety devices in connection with the vertical ladder from which the deceased fell, an inspection of the premises appeared desirable, and was, in fact, agreed to by the defendants' counsel, and as a result of this inspection the Trial Judge found that all these suggestions were impracticable or undesirable. A Judge is not entitled " to put a view in the place of evidence " (see *London General Omnibus Co. Ltd. v. Lavell* (1), Lord Alverstone C.J.), and although, in my opinion, the power to view the *locus in quo* should be sparingly used, I am of opinion that in the present case the fact that the Trial Judge did view the ladder and the premises, cannot be disregarded on the hearing of this appeal, while it is merely a factor in the case which, on the questions for our decision, is not of much assistance.

It is evident from the Statement of Claim as also from the evidence of Mr. Parkinson that the plaintiff's case was largely, but not entirely, based on the contention that the vertical steel ladder was *per se* (as distinct from the manner in which it was used) dangerous—Mr. Parkinson detailed some suggestions as to methods of making it safe. All these suggestions were negatived by the Lord Chief Justice, who summed up his view of this part of the case in the words, " In " truth, properly used, the ladder as a vertical ladder " is as safe as it can reasonably be made to be. In " other words, it is not the ladder itself which causes " the danger or to which exception can properly be

(1) [1901] 1 Ch. 135, 139.

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"taken." This finding of the Lord Chief Justice is not now challenged on behalf of the plaintiff.

The Lord Chief Justice, however, proceeded to find that when this fatal accident happened there was, in this part of the Gas Works, a defective system of work to which the death of the deceased was directly attributable and accordingly gave judgment for the plaintiff. No question arises as to the amount of damages awarded, but Mr. Curran on behalf of the defendants argued that this finding of the Lord Chief Justice should be set aside on the grounds: (1) That this was not a case of a "system of working"; (2) That if it was a case of a system of working such system was not defective; (3) That it was not established that the accident was caused by such system, and (4) That the deceased was guilty of contributory negligence. On the first submission of counsel a number of cases were cited on both sides, and to these may now be added the recently reported case *Colfar v. Coggins and Griffith (Liverpool) Ltd.* (1). In *Smith v. Baker* (2), Lord Halsbury L.C. said: "I think "the cases cited at your Lordships' Bar . . . "established conclusively the point for which they "were cited, that a negligent system or a negligent "mode of using perfectly sound machinery may make "the employer liable quite apart from any of the "provisions of the Employers' Liability Act." In *Paterson v. Wallace & Co.* (3), Lord Cranworth said: "When a master employs a servant in a work of a "dangerous character he is bound to take all reason-"able precautions for the safety of that workman. "This is the law of England no less than the law of "Scotland." This passage is referred to, during the course of the argument in *Wilson and Clyde Coal Co. v. English* (4), by Lord Atkin, and in his speech in that case Lord Maugham says: "In the case of employ-"ments involving risk . . . it was held that there "was a duty on the employer to take reasonable care "and to use reasonable skill, first, to provide and "maintain proper machinery, plant, appliances and

(1) [1945] A.C. 197.
(2) [1891] A.C. 325, 339.
(3) 1 Macq. 748, 751.
(4) [1938] A.C. 57, 61, 86.

" works . . . and thirdly to provide a proper system " of working." In discussing " system of working " in *Speed v. Thomas Swift & Co.* (1), Lord Greene M.R. says : " I do not venture to suggest a definition of what " is meant by system, but it includes, in my opinion, or " may include according to circumstances, such matters " as the physical lay-out of the job—the setting of the " stage so to speak—the sequence in which the work " is to be carried out, the provision in proper cases of " warnings and notices and the issue of special " instructions." A few lines later (on page 564) Lord Greene says : " The examples which I have given are " not intended in any way to be an exhaustive list. " I give them merely to bring out the point that the " safety of a system must be considered in relation " to the particular circumstances of each particular " job." In his speech in *Colfar's case* (2), Lord Simon L.C. refers with approval to a passage in *English v. Wilson and Clyde Coal Co. Ltd.* (3), in which the difference between system and what falls short of system is explained by the Lord Justice Clerk in the words : " the distinction is between the general and the " particular, between the practice and method adopted " in carrying on the master's business of which the " master is presumed to be aware and the insufficiency " of which he can guard against, and isolated or day " to day acts of the servant of which the master is not " presumed to be aware and which he cannot guard " against."

Mr. Curran argued that carrying damper rods up and down this vertical ladder was " simply a casual " matter in the working of these gas works " and that, accordingly, it did not come within any definition of " system of working."

I am clearly of opinion that the trial judge was entitled to hold on the evidence of Mr. Armstrong and Mr. Heslip that, for the purpose of transferring damper rods from one platform to another, one " system " or " practice and method " approved and authorized by the management was for the workmen

(1) [1943] K.B. 557, 563, 564.
(2) [1945] A.C. 197.
(3) [1936] S.C. 883, 904.

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to carry these rods in their hands up or down this vertical ladder, while I am also of opinion that if this carrying of these rods up and down this vertical ladder was dangerous—a matter which I shall discuss later—the defendants in providing this vertical ladder as the means of communication between the platforms would not on the facts have taken all reasonable precautions for the safety of their workmen.

This brings me to the consideration of Mr. Curran's second argument. He argues that, on the evidence of Mr. Armstrong and Mr. Heslip, it was *not* dangerous for a workman to ascend or descend this ladder while carrying a damper rod. Undoubtedly the evidence of these two witnesses makes a strong case in favour of this argument ; the damper rods have been so carried on occasions for a number of years and there has been no previous accident. On the other hand there is the emphatic expression of opinion by the consulting engineer, Mr. Parkinson, who had not, it is true, inspected other gas works but saw this ladder and considered the length and weight of the damper rod. It is not suggested that Mr. Parkinson as an Engineer was not acquainted with ladders, and while the evidence of Mr. Armstrong and Mr. Heslip might have been preferred to that of Mr. Parkinson on this subject, I cannot say that, on the evidence, the Lord Chief Justice was wrong in coming to the conclusion that the carrying of damper rods up and down this ladder was dangerous. The weight of the rod (7½lbs.) is substantial, and its length (6 ft.) would seem to me to make it awkward to balance the rod while climbing the ladder. Mr. Heslip, in cross-examination, agreed that " You require support of some sort of both hands. " If he couldn't get that support, then I would not " say safe " and I cannot see why the Lord Chief Justice should not prefer the opinion of Mr. Parkinson, " Impracticable to get grip on ladder with hand " holding damper rod," to that of Mr. Armstrong, " The man puts rod in palm of hand and slides hand " down with rod between palm and side of ladder. " Quite easy to do this. You have the grip with both " hands," and of Mr. Heslip, " It is quite practicable

" to hold rod and at same time put hand round side of " ladder. These men are accustomed to doing this " dozens of times a day." While it is not essential, in my opinion, that I should be affirmatively satisfied that the view formed by the Lord Chief Justice was correct, it is right that I should say that on the evidence before us I would agree with him.

Mr. Curran also contended that there was no evidence which would have entitled the Lord Chief Justice to come to the conclusion that the deceased was carrying a damper rod at, or immediately prior, to the time of his fall. I do not agree with this, and again would have come to the same conclusion on this matter, as the Lord Chief Justice has done. " A few seconds to a " minute before the accident " Armstrong had seen the deceased on the producer platform. He (Armstrong) says : " I had just told him we would regulate dampers " on producer platform for which we would require rod " I can't say if there was a damper rod on this first " platform. I *had* requested him to get a damper rod " (the judgment of the Lord Chief Justice and his reply to our query make it clear to my mind that this word should read " had " and not " have "). " For this " particular work any rod would have done." When to this evidence of Armstrong is added the finding (after the accident) of a damper rod " on gangway at " bottom of ladder," I think that the inference drawn by the Lord Chief Justice on this matter was clearly right. There is nothing to suggest that the damper rod so found after the accident was there prior to the accident, it is natural that Armstrong who saw the deceased actually falling, would not have noticed the fall of the damper rod ; while damper rods (" some of " damper rods ") are according to Armstrong kept on the producer platform there is no reason why a rod should be kept not on the platform but on the gangway. Armstrong's statement : " It is not absolutely necessary " to bring rods down—possibly the man has a special " rod he likes " when taken in conjunction with his request to the deceased to get a damper rod and his statement : " For this particular work any rod would " have done," certainly suggests that prior to the

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accident there was a shortage of damper rods on the producer platform.

Mr. Curran's third contention raises to my mind the greatest difficulty in the case. There is no positive evidence as to the cause of the accident. All that we know is that the deceased fell off the ladder, and on the evidence I think that the fair inference is that at the time of the accident he was climbing down the ladder, and that he was carrying a damper rod. On such evidence as there is with regard to the health of the deceased who was aged 57 (the widow said : " He " was in good health—never complained—a strong " man—no illness," and Armstrong said : " I spoke " to deceased that day, in his usual health ") I think that the probability of a sudden seizure as the explanation of the fall is negatived.

As I have said, I am of opinion that the Lord Chief Justice was entitled to hold that the deceased was carrying a damper rod and that for a man so burdened the vertical ladder as a means of communication between the platforms was dangerous. It is true that for some unexplained reason his foot may have slipped on a rung of the ladder, but if he had a good grip on the sides or rungs of the ladder when a foot slipped he ought not to have fallen. Armstrong said : " First " thing to attract attention—I saw him falling off " ladder but don't know if feet off it at that time. " He was falling backwards," a description which would indicate that for some reason the hands of the deceased had lost their grip on the ladder. Having regard to the inference drawn by the Lord Chief Justice (to my mind rightly) as to the holding of a damper rod, that " It is the holding of these damper rods in the hand " which interferes with the firm and continuous grip " which is in my opinion an essential condition of " safety and security in the use of a ladder of this " type," I think that he was entitled to hold that, even if the foot or feet of the deceased slipped (as to which there is no evidence), the cause of his fall was the carrying of this rod. Certainly, I cannot say that I am satisfied that the Lord Chief Justice was wrong in coming to this conclusion on the evidence. One is

painfully aware of the difficulty, when discussing a question of legal responsibility, of determining the "cause" of an accident, and the metaphysical considerations which obtrude themselves into such discussions, but when one thing (here the damper rod) renders the position of a man on a ladder dangerous, and when that man is seen to fall backwards off that ladder, I think that a trial judge is entitled to come to the conclusion that in the legal sense the damper rod caused the fall, there being nothing to suggest any reason for the fall other than the carrying of the damper rod.

Lastly, Mr. Curran contended that the deceased on the evidence should have been found guilty of contributory negligence. I do not think so. No doubt a man using a vertical ladder must exercise caution which would be unnecessary on a staircase with shallow steps. In the present case, however, I cannot see any evidence of negligence on the part of the deceased. He was authorized, if not directed, to carry the damper rod when on the ladder, while such rods might be "handed down, lowered or dropped" no instructions were given to the workmen that any of these methods should be adopted—there is no evidence that the deceased had any preference for any special rod—general evidence as to "some men" having such preferences cannot be accepted as proof of this fact in the case of the deceased, and even if such preference were established I fail to understand how this could be evidence of contributory negligence on his part. There is no suggestion that the deceased (a man of 57) was larking, and there is no suggestion of intoxication—the accident happened at about 9-30 a.m.

On the whole case, the Lord Chief Justice was entitled to "weigh the probabilities" (see Bankes L.J., *Munro Brice & Co. v. Marten and Others* (1) to "compare and balance probabilities" (Lord Birkenhead L.C., *Lancaster v. Blackwell Colliery Co. Ltd.* (2), and so far from feeling satisfied that the conclusion at which he arrived is wrong, I agree with it, and am of opinion that this appeal should be dismissed.

(1) 36 T.L.R. 241. (2) 12 B.W.C.C. 400, 406.

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BLACK J.: The deceased man, James Larmour, was employed as a labourer in the Belfast Corporation Gas Works. Part of his work lay in the retort house and one of his duties was to assist in drawing dampers so as to increase or reduce draught. For this task damper rods were used. These are bars of iron or steel about six feet in length and weighing about seven and a half lbs. There are four platforms at different levels in the retort house and access to each of the upper platforms from the platform immediately below is by a vertical steel ladder with steel rungs half an inch in diameter and steel sides two and a half inches wide. The Lord Chief Justice has found that a system of working obtained in the Gas Works—well known to and acquiesced in by the management—of workmen carrying these damper rods from one platform to another via the vertical steel ladders. He has held that a system under which workmen such as the deceased were accustomed to ascend or descend vertical steel ladders of the type installed in the Gas Works while carrying rods of the length and weight of the damper rods, was a system which involved an unnecessary element of danger. The danger, according to the Lord Chief Justice consisted in the fact that the holding of one of these damper rods in the hand while ascending or descending the ladder was bound to interfere with the firm and continuous grip which, in the Lord Chief Justice's opinion, was an essential condition of safety and security in the use of a ladder of this type. And the danger was unnecessary inasmuch as a sufficient number and variety of damper rods could have been provided on each platform at trifling expense.

I think it is reasonably clear from the evidence that such a system of working as the Lord Chief Justice describes obtained in the Gas Works. As regards the danger alleged to be involved in the system there was a conflict of evidence. The plaintiff's expert witness, Mr. Parkinson, considered the system dangerous. Mr. Heslip, the Gas Works Manager, took the opposite view. It would appear to me that it could not legitimately be said that in the circumstances it was

not open to the Lord Chief Justice to arrive at the finding which I have just mentioned in regard to the alleged danger of the system. And if this is the case I do not think that this Court would be justified in refusing to accept the trial judge's finding on the point. On this aspect of the case I would refer to *Monaghan v. W. H. Rhodes & Son* (1)—also a ladder case—and in particular to the observations of Lord Sterndale M.R. as to the duty of the Court of Appeal to accept the trial judge's finding that the ladder was a dangerous thing, there being evidence both ways.

The next question is whether it was sufficiently established from the evidence that Larmour met his death while descending the ladder carrying a damper rod. From the witness Armstrong's evidence it appeared that he had seen Larmour on the producer platform a few seconds to a minute before the accident, which might have been a sufficiently long time for him to have gone up the ladder to the first platform, lifted a rod, and be on his way down the ladder again. Moreover, Armstrong had told him that they were going to pull dampers on the producer platform and had requested him to get a damper rod. And after the accident a damper rod was found lying on the gangway (leading to the producer platform) at the bottom of the ladder. I think that the natural inference from this evidence is undoubtedly that drawn by the Lord Chief Justice, that Larmour met his death by falling from the ladder while carrying down a damper rod from the first platform to the producer platform.

Assuming then that there was an element of danger involved in the system in accordance with which the deceased was carrying a damper rod while descending the vertical ladder, and that the deceased fell from the ladder while actually engaged in doing this, the question still remains whether it is to be inferred that the deceased's fall was caused by the existence of this element of danger. There is no doubt no direct evidence as to what precisely caused Larmour's fall. But as was said by Willes J. in a well known passage

(1) [1920] 1 K.B. 487, 494, 495.

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in *Cooper v. Slade* (1), which has been quoted so recently as 1943 by the English Court of Criminal Appeal in *R. v. Carr-Briant* (2) and by Goddard L.J. in *Re Grosvenor* (3), it is an elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict. The learned Lord Chief Justice does not elaborate upon the point in his judgment ; but he must have come to the conclusion that the balance of probability was that the cause of Larmour's fall was to be sought in the danger which the Lord Chief Justice found to be attendant upon the system of carrying damper rods up and down the vertical ladder. The appellants have not succeeded in convincing me that this conclusion was wrong. As expressing my view on the matter I should like respectfully to quote and adopt some sentences from a recent judgment of a distinguished English judge. In *Gibby v. East Grinstead Gas and Water Co.* (4), Goddard L.J. is reported as saying : " I approach the " case on the footing . . . that there was negligence " in the defendants . . . Therefore we have to " consider whether the negligence found by the judge " is in truth negligence contributing to the accident. " He has found negligence here, and although this is " not a case in which the demeanour or credibility of " the witnesses formed any element in the case, because " there was no real conflict of evidence, nevertheless " it is no function of an appellate court to reverse a " finding of this description merely because they think " that might be the right course to take. The duty of " an appellate court is to reverse a decision which they " are convinced is wrong. I am certainly not con- " vinced that the finding . . . was wrong." Accordingly I cannot accept the contention that the Lord Chief Justice's conclusion that the system of working was the cause of Larmour's death is a finding which should be reversed by the Court of Appeal.

With regard to the argument so strenuously urged by the appellants that the facts show that Larmour

(1) 6 H. L.C. 746, 772.
(2) [1943] K.B. 607, 611.
(3) [1944] Ch. 138, 153.
(4) [1944] 1 All. E. R. 358, 361.

was guilty of contributory negligence, it is well established by decisions of the highest authority that the onus of establishing contributory negligence is on the defendants. It is sufficient to refer to *Wakelin's case* (1) and *Caswell's case* (2). And I can only say that in the present case I can see no evidence at all of contributory negligence on the part of Larmour.

The only other matter which I should like to mention is that I have not found it necessary to consider whether any defence could be made on the basis of the principle expressed in the maxim *volenti non fit injuria*. Such a defence was not raised in the pleadings nor was it made an issue at the trial before the Lord Chief Justice. We are accordingly exempted from the necessity of considering it in this Court.

Solicitor for the appellants : *S. Love, Town Solicitor.*
Solicitors for the respondents : *N. & F. Tughan.*

J, McC.

(1) 12 App. Cas. 41. (2) [1940] A.C. 152.

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Mar. 1.
June 29.

RUSSELL v. MINISTRY OF COMMERCE FOR NORTHERN IRELAND.

Local carrier's licence—Whether a personal privilege or property—Transferability of—Road and Railway Transport Act (Northern Ireland), 1935, secs. 5, 15, 16—Government of Ireland Act, 1920, sec. 5.

A local carrier's licence under the provisions of section 16 (3) of the Road and Railway Transport Act (Northern Ireland), 1935, is a privilege personal to the licensee. Accordingly it is not transferable *inter vivos*, it cannot be disposed of by will, and it does not form part of the estate of a deceased licensee.

ORIGINATING SUMMONS.

The plaintiff carried on business as a carrier of merchandise in Northern Ireland and within the county borough of Belfast under a licence granted to him by the Ministry of Home Affairs for Northern Ireland on September 1, 1935, under section 16 (3) of the Road and Railway Transport Act (Northern Ireland), 1935. Having formed a private Company limited by shares to take over his said business he intimated to the Ministry of Home Affairs that he proposed to transfer his licence to the Company. The Ministry, however, took the view that licences granted under section 16 were not transferable. Subsequently the functions of the Ministry of Home Affairs under section 16 were transferred to the Ministry of Commerce and the latter Ministry adhered to the opinion of the Ministry of Home Affairs as to the non-transferability of the said licences. The plaintiff accordingly instituted these proceedings to have it decided whether upon the true construction of section 16 licences granted under that section were transferable *inter vivos* and whether such licences formed part of the estate of a deceased licensee and could be disposed of by will.

Chambers, K.C., and *Patton* for the plaintiff.

Curran, K.C., and *Nicholson*, for the defendant.

Cur. adv. vult.

BLACK J. : This is an application brought under the provisions of Order LIV A, r. 1 (ii), for the determination of the much vexed question as to the precise nature of a Local Carrier's Licence issued under section 16 of the Road and Railway Transport Act (Northern Ireland), 1935. The plaintiff is the holder of a Belfast Local Carrier's Licence issued under the said section and the Ministry of Commerce is named as defendant inasmuch as the functions of the Ministry of Home Affairs under section 16 have been transferred to the Ministry of Commerce by the Ministries (Transfer of Functions) (No. 3) Order, 1944 (S.R. & O. (N.I.) 1944 No. 111).

The questions submitted for decision are : (1) whether upon the true construction of section 16 a Local Carrier's Licence granted under that section is transferable *inter vivos* ; and (2) whether such a licence forms part of the estate of a deceased licensee passing to his personal representatives and may be disposed of by his will.

By section 5 (1) of the Act of 1935 it was provided that the Northern Ireland Road Transport Board should acquire every road motor undertaking operated for hire or reward in Northern Ireland with certain limited exceptions indicated in the subsection. And by section 15 (1) of the Act it was enacted that no person other than the Board should use a motor vehicle on a public highway for the conveyance of passengers or their luggage or the carriage of merchandise for hire or reward except with the consent in writing of the Board and the approval of the Ministry of Home Affairs. The generality of this latter provision was, however, made subject to certain exceptions. By section 15 (4) (*d*) it was provided that the section should not apply to the use of a motor vehicle for the collection, carriage and delivery of merchandise within the county borough of Belfast or the county borough of Londonderry. And the effect of section 5 (1) (*c*) when read in conjunction with section 15 (4) (*d*) was to exempt a road motor undertaking from the liability under section 5 to compulsory acquisition by the Board in so far as such undertaking was carried on

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immediately before the passing of the Act for the collection, carriage and delivery of merchandise within either of the two county boroughs. Special provision was then made by section 16 of the Act in regard to Belfast and Londonderry. By section 16 (1) it was enacted that no person other than the Board or the Belfast Corporation should use a road vehicle on any public highway within the county borough of Belfast or the county borough of Londonderry for the collection and delivery of merchandise for hire or reward within either of these county boroughs unless such person was licensed for the purpose under the section. Such a person is referred to in the section as a local carrier. By section 16 (2) it was provided that subject to the provisions of the section the Ministry of Home Affairs might from time to time grant licences to local carriers. And section 16 (3) then proceeded to enact that the Ministry should grant a licence under the section to every local carrier who was at the passing of the Act and had been since the 31st May, 1934, carrying on business as a local carrier, and that the Ministry should not grant such a licence to any other person unless the Ministry was of opinion that the number of persons for the time being licensed as local carriers was not sufficient to meet the requirements of the public.

The question for determination in these proceedings is what is the nature of a licence issued to a local carrier under these provisions of section 16. Is it on the one hand a mere personal right which is not transferable and which dies with the person to whom the licence is issued ? Or is it a species of property which is capable of assignment from one person to another and which passes on the licensee's death as part of his personal estate ?

At the outset there are one or two points to be noted in regard to the scope of section 16.

In the first place it is to be observed that the provisions of section 16 relate to road vehicles generally, and not merely to motor vehicles. Contrast this with the provisions of section 15 of the Act which relate solely to motor vehicles. Outside Belfast and London derry although a person cannot use a *motor* vehicle

for carrying merchandise for hire or reward except with the consent of the Board and the approval of the Ministry (section 15 (1)), yet he is fully at liberty to engage without restriction in the business of a carrier so long as he uses only horse drawn vehicles. Under section 16, however, a person cannot use a road vehicle *of any type* for the collection and delivery of merchandise for hire or reward within either of the county boroughs unless he holds a local carrier's licence. Even the man who plies the most humble and casual carrying trade with a pony and van or a donkey and cart is not entitled to do so without a local carrier's licence.

In the second place it is to be noted that under section 16 it is the carrier who is to be licensed, and not his vehicles. Once a carrier has obtained a licence there is no limitation whatever of the number or type of vehicles which he may employ. A licence issued on foot of a small and precarious trade carried on with a vehicle of the most humble type before the passing of the Act would suffice to entitle the holder of the licence to engage in business as a carrier on the very largest scale with a whole fleet of motor vehicles if it ever became financially possible for him to do so.

Again, it is clear that the conditions under which the Ministry were empowered under section 16 (3) to grant local carriers' licences were designed to safeguard the position of existing local carriers. Under the subsection every existing local carrier who had been carrying on business since the 31st May, 1934, was entitled as of right to be granted a local carrier's licence, and under the latter part of the subsection the Ministry was forbidden to grant such a licence to any outsider unless it was of opinion that the number of persons for the time being holding local carriers' licences was not sufficient to meet the requirements of the public. One conjectures that a reason for the insertion of this latter provision may have been an apprehension that, in the absence of such a provision, some of the persons who had previously carried on business as carriers in districts outside Belfast and Londonderry might, after receiving the compensation for the transfer of their undertakings under section 6 of the Act, be tempted

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to utilise the compensation moneys for the purpose of setting themselves up as carriers in competition with the existing carriers within the two county boroughs. Whether this be the true explanation or not, it is at any rate quite clear from the terms of section 16 (3) that the Legislature was endeavouring to protect existing local carriers in Belfast and Londonderry from undue competition by outsiders.

What then are the attributes of a local carrier's licence granted under the provisions of section 16 of the Act? The word licence has a well recognised signification in English law. According to our law a licence properly so called is merely a permission granted to a person to do some act which but for such permission it would be unlawful for him to do. Being in its nature a mere personal privilege and nothing more than a mere personal privilege—a privilege personal to the individual licensee—such a licence cannot be transferred by him to anyone else and it dies with the person to whom it was given (see Wharton's Law Lexicon, 13th Ed. (1925) p. 506; Odgers' Common Law, Vol. I, p. 574; Bouvier's Law Dictionary s.v. Licence). There are, of course, different types of licence. A man may grant another a licence to use the grantor's property in some particular way. Or a statute may authorise the granting of a licence to carry on some trade or business which the statute does not allow to be carried on without such a licence. But whatever may be the type of licence, the presumption is that it is a purely personal privilege, that it is not capable of being assigned or transferred by the licensee to anyone else, and that it comes to an end on the death of the licensee. No doubt one frequently hears the phrase "transfer of a licence" especially in connection with the law relating to the sale of intoxicating liquors. But it is well established that even in this connection the phrase, though perhaps convenient, is nevertheless quite inaccurate and misleading. What is referred to as a transfer of a publican's licence is not in strict law a transfer at all. A licence to sell intoxicating liquors is a personal privilege granted to a named individual. And what

the assignee of licensed premises gets is a new licence and not the old licence transferred (see *R.* (*Hore*) *v. Wexford JJ.* (1) per Fitzgibbon L.J. at p. 54; *R.* (*Duggan*) *v. County Court Judge of Fermanagh* (2) per Madden J. at p. 154 and Gibson J. at p. 161).

It is contended, however, on behalf of the plaintiff that a careful consideration of the provisions of section 16 will show that on the true construction of the section the word licence must mean something more than a mere permission strictly personal to the original licensee, and that in order to give a fair and just meaning to the section a local carrier's licence granted under the provisions of the section must be held to be capable of assignment by the licensee during his lifetime and to pass upon his death to his personal representatives as part of his estate. It is at once apparent that if a local carrier's licence under section 16 is held to be a mere personal privilege which comes to an end at the death of the licensee grave inequalities will arise in the treatment of the existing carriers. One man's business may go on for many years under the protection of his licence; another man's business may be brought to an early end by reason of his death and the consequent lapse of his licence shortly after the passing of the Act. Moreover it is conceded that the word " person " in section 16 must be read as including limited companies (Interpretation Act, 1889, s. 19). This will intensify the inequality. A man fortunate enough to have floated his business as a limited company will be entitled to secure for the company a licence which will last indefinitely; the licence of his competitor who had not taken a similar step may lapse within a year or two after the commencement of the Act. It is consequently argued that the Legislature cannot be held to have intended to establish a system fraught with such serious and manifest inequalities, and the conclusion is invited that the local carriers' licences instituted under section 16 must be perpetual licences assignable *inter vivos* and transmissible on the licensee's death to his personal representatives.

Furthermore it is legitimately pointed out that if the

(1) [1904] 2 I.R. 51. (2) [1909] 2 I.R. 132.

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licence granted to a Belfast or Londonderry city carrier under the provisions of section 16 comes to an end with the carrier's death, then the result will be that upon his death the goodwill of his business will be immediately swept away without a penny of compensation to his estate ; whereas in the case of the country carriers when their undertakings were taken over by the Board they received compensation in respect of the goodwill of their undertakings which was considered by the Court of Appeal to have been measured with very great generosity, *O'Neill v. Northern Ireland Road Transport Board* (1).

In support of their arguments the plaintiff's counsel have naturally referred to such cases as *In re Brockelbank* (2), for the proposition that in construing a statute the Court will act on the view that the Legislature is not likely to have intended to produce a result which would be palpably unjust, and to the well known line of authorities such as *London and North Western Railway Co. v. Evans* (3), *Central Control Board v. Cannon Brewery Co. Ltd.* (4), and *Att.-Gen. v. De Keyser's Royal Hotel* (5), which establish that the intention to take away the property of a subject without giving to him a legal right of compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms. And in this connection they have called attention to the dictum of Salters J. in *Newcastle Breweries Ltd. v. The King* (6), that the rule must apply no less to partial than to total confiscation. They have also sought to rely upon the prohibition in section 5 of the Government of Ireland Act, 1920, against the making of laws so as to take any property without compensation, not indeed as the basis of a contention that the provisions of section 16 of the Act of 1935 are *ultra vires* the Northern Ireland Legislature, for it would not be open to them to raise this contention in the present proceedings. But, they argue, as between two possible constructions of section 16 it

(1) [1938] N.I. 104, 125.
(2) 23 Q.B.D. 461.
(3) [1893] 1 Ch. 16.
(4) [1919] A.C. 744.
(5) [1920] A.C. 508.
(6) [1920] 1 K.B. 866.

must, if possible, be given that construction which would not infringe the prohibition in section 5 of the Act of 1920, and they contend that section 16 would infringe this prohibition if the local carrier's licence under the section is to be treated as purely personal and inalienable and as coming to an end at the death of the licensee. And even if, they say, it is held on the authority of the judgments of the majority of the Court of Appeal in the case of *Northern Ireland Road Transport Board v. Benson* (1), that such a construction of section 16 would not involve an infringement of the prohibition in section 5 of the Act of 1920, yet they would still contend that such construction is not only contrary to the elementary principle of justice reiterated time and again in such cases as the *Cannon Brewery case* (2) and the *De Keyser's Hotel case* (3), but is also contrary to the spirit, if not the letter, of the provisions of section 5 which were obviously designed to give that principle statutory force.

These are indeed weighty arguments. But it is not difficult to see that there are also arguments of weight to be adduced on the other side. As I have pointed out, the provisions of section 16 (3) show clearly that in framing this scheme of local carriers' licences the Legislature was greatly concerned to provide a protection for the position of existing local carriers. But if the contentions put forward on behalf of the plaintiff were accepted it appears to me that the intention of the Legislature to protect existing local carriers would be completely defeated and that the protection sought to be provided by section 16 (3) would be an absolute nullity. It will be remembered that every existing local carrier, however humble his business and however poor his equipment, is under section 16 (3) entitled as of right to be granted a local carrier's licence. And it will also be remembered that the possession of such a licence will entitle the holder to engage in business on the most extensive scale with as large a fleet of vehicles as he can command. With every existing local carrier entitled to a licence, it will be obvious that if such

(1) [1940] N.I. 133.
(2) [1919] A.C. 744.
(3) [1920] A.C. 508.

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licences are transferable there will be a considerable number of licensees of small resources who would be glad to dispose of their licences for comparatively small sums and accordingly, if an outsider desired to enter the carrying business in either of the county boroughs on an extensive scale, it would be quite easy for him to provide himself with a local carrier's licence. If this were the position it requires no argument to show that, so far as safeguarding local carriers is concerned, section 16 (3) would simply be so much waste paper. The section can surely not be given an effect which would so completely defeat one of the objects which it seeks to attain.

Another consideration which appears to me to be one of considerable weight is this. Section 16 (7) provides that a person using a road vehicle in contravention of the section is to be liable to a very substantial penalty. In order that the authorities may be in a position to administer the provisions of section 16 and to institute proceedings against persons contravening the section, it will be essential for them to know who are the persons who are from time to time the holders of local carriers' licences. This will be easy if the licences are purely personal and not transferable. It will only be necessary to look at the record of the names and addresses of the persons to whom the licences are issued. But if the licences were transferable it appears to me that it would be essential for the due administration of the licensing system to have provisions requiring the registration of transfers and the keeping of a register of the persons for the time being entitled to the licences. Without such provisions it would become practically impossible to administer section 16 as time went on and licences passed through several hands. The fact that there is nothing in section 16 requiring the registration of transfers of licences or the keeping of a register of holders of licences seems to me to point strongly to the conclusion that the Legislature did not intend that the licences should be assignable.

There are, accordingly, in my opinion serious difficulties in the way of accepting the plaintiff's

contention as to the nature of the local carrier's licence under section 16. As I have already indicated, when one finds the word "licence" used in a statute the presumption is that it is intended to designate a purely personal privilege, a privilege not capable of being assigned or transferred by the licensee to anyone else and which comes to an end on the death of the licensee. If the licence is to be more than this, if it is to be transferable by the licensee in his lifetime or if it is to form part of his estate after his death, one has to find this indicated in the Statute. Notwithstanding the inequalities and hardships which, as the plaintiff has pointed out, are involved in treating local carriers' licences as purely personal, I have not been able to find in the Statute any *clear* indication that the licences are to be anything more than this. And in addition to this absence of any clear indication in the Statute, the difficulties which, as I have shown, would arise from accepting the plaintiff's contentions appear to me sufficient, and more than sufficient, to preclude me from holding that the plaintiff has succeeded in establishing that the word licence in section 16 must be read as bearing some signification other than the well recognized meaning attached to the word licence in English law.

In my opinion, therefore, both the questions submitted for decision must be answered in the negative.

Solicitor for the plaintiff: *Henry J. Catchpole.*
Solicitor for the defendant: *Chief Crown Solicitor.*

M.V.P.

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DIVORCE—Desertion—*Conduct of party charged—Intention to desert* The parties were married on 21st October, 1940; they spent the wedding night together and shortly afterwards spent a week-end as man and wife; these were the only occasions when they lived together as man and wife. At the time of the marriage the respondent was a private in the army from which he was discharged on 4th June, 1942. After the marriage the respondent visited the petitioner from time to time; the petitioner wrote to the respondent about twice a week, and he wrote to her less frequently. The petitioner applied for enlistment in the Auxiliary Territorial Service, and informed the respondent that she had done so; on 26th May, 1941, she was called up. After May, 1941, the respondent never wrote to the petitioner and never visited her until 12th August, 1941, when he came unexpectedly to Carrickfergus where she was then stationed; the petitioner asked the respondent why he had not telegraphed to her as she could have arranged for leave, he said that he did not know that that could be arranged; when he was leaving he suggested that the petitioner should come with him and that they should spend a week-end together, she said she had not got leave, and refused to do so. The respondent never gave the petitioner any money, but she got an army allowance as his wife. At Christmas, 1941, the respondent sent a Christmas card to the petitioner's mother on which he wrote begging for 10*s.* 0*d.* The only subsequent occasions when the parties met were when they met by chance on a railway station and the respondent when passing the petitioner said to her, "Do you want a divorce?" and walked on without waiting for an answer, and at the service of the petition when on being served the respondent said that "it suited him "fine." On the hearing of a petition by the wife for a decree of divorce on the ground of desertion. *Held*, that the petitioner was entitled to a decree on that ground. *Baxter v. Baxter.* Murphy, L.J. 125

EASEMENT—Two tenements belonging to one owner—Sale of one of them—Implied reservation. The owner of two adjoining houses one of which he held for the residue of a term of 989 years, sub-let that house on a quarterly tenancy; a path led from the county road over portion of the lands attached to the other house to the back door of the house so sub-let, and to no other place; the path was convenient but not essential for the enjoyment of the house; it was clearly visible to anyone viewing the premises. On a sale of the other house by the executors of the owner, under an agreement which did not mention the path, the vendors claimed that they were entitled to except and reserve from the conveyance to the purchaser of the house so sold, a right of way for the residue of the said term of 989 years over the path for the benefit of the house so sub-let. *Held*, that the vendors were not entitled to except or reserve from the conveyance to the purchaser of the property sold any right of way over the path, but that they were entitled to have the conveyance so worded as to convey the property subject during the existing quarterly tenancy of the house so sub-let, and any statutory tenancy which might arise on the determination of that quarterly tenancy by virtue of the Rent and Mortgage Interest (Restrictions) Acts, to such right of way over the path as the tenant of that house, his executors administrators or assigns might be entitled to as an incident of his tenancy. *Wheeldon v. Burrows* (1) and *Thomas v. Owen* (2) considered. *In re Flanigan and McGarvey and Thompson's Contract.* .. .. Ch.D. 32

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INCOME TAX—Exempton—Charity—*Fund to provide annuities for pastors, evangelists and missionaries paying specified subscriptions to fund, their widows and orphans—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sec.* 37 (1) (*b*). The appellants were trustees of a fund which was established by the Baptist Union of Ireland for the purpose of providing annuities for pastors of the churches within the Union, evangelists under the control of the Union, and missionaries of the Irish Baptist Foreign Mission, and their widows and orphans. By the Rules for the administration of the fund it was provided that it should be administered by the Union, that the pastors, evangelists and missionaries who and whose widows and orphans should benefit by the fund should be those admitted by a committee of the Union, that the persons so admitted should pay entrance fees and annual subscriptions of specified amounts, or single sums of specified amounts in lieu thereof, that the rights of any person whose subscriptions were in arrear or whom the Committee should think morally unfit to receive such benefit should cease, and that if the funds were sufficient certain specified annuities should be paid to such pastors evangelists and missionaries on their retirement at the age of 65 years or on becoming permanently incapacitated, and to their widows and orphans. The fund was made up of voluntary donations and the sums received for entrance fees and annual subscriptions. The appellants also held certain investments on trust to defray the annual subscriptions and entrance fees of members of the funds. *Held*, that the whole income from investments held by the appellants for the purposes of the fund and on trust to defray the annual subscriptions and entrance fees was applicable for charitable purposes only and was exempt from Income Tax. *Baptist Union of Ireland Corporation Limited, Appellants; Commissioners of Inland Revenue, Respondents* K.B.D. 99

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Board to be constituted by the scheme certain members of which should be elected by producers of the product regulated. The appellant was empowered by the scheme to buy and sell pigs, to produce bacon and other pig products, to establish slaughter-houses and to supply pig producers with anything required for the production of pigs. By the scheme the appellant was also empowered to borrow money and to levy contributions from pig producers, was required to pay into a fund all moneys received, and was given power to invest any money standing to the credit of the fund, and to employ servants and officials subject to the approval of the Ministry of Agriculture. Under the scheme any moneys standing to the credit of the fund which were not required for the operation of the scheme were to be distributed among pig producers, but by the Bacon Industry Act, 1939, it was provided that they should be applied for the benefit of the pig producing industry. At the time the Board was established the pig producing industry was in a depressed state and the operations of the Board conferred substantial benefit on it with consequential benefit to the general trading community. An assessment to income tax on the income of its invested funds having been made, the Board claimed exemption on the ground that it was established for charitable purposes only. *Held*, that the Board was not established for charitable purposes only, and therefore that it was not entitled to the exemption claimed. *Pig Marketing Board (Northern Ireland), Appellants; Commissioners of Inland Revenue, Respondents.* .. .. K.B.D. 155

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LOCAL CARRIER'S LICENCE—Whether a personal privilege or property—*Transferability of—Road and Railway Transport Act (Northern Ireland)*, 1935, *secs.* 5, 15, 16—*Government of Ireland Act*, 1920, *sec.* 5. A local carrier's licence under the provisions of section 16 (3) of the Road and Railway Transport Act (Northern Ireland), 1935, is a privilege personal to the licensee. Accordingly it is not transferable *inter vivos*, it cannot be disposed of by will, and it does not form part of the estate of a deceased licensee. *Russell v. Ministry of Commerce for Northern Ireland.* Ch.D. 184

MASTER AND SERVANT—*Injury to servant—Dangerous system of working—Negligence of master.* The plaintiff was the widow of a man who was employed in the defendants' gas-works, and who was killed accidentally when working there. Part of the deceased man's duties consisted in drawing dampers so as to increase or reduce draught; the dampers were placed at different levels each served by a platform from which the draught could be regulated by the workmen using damper rods of iron or steel about six feet long and weighing about seven and a half pounds. The access to the platforms was by vertical steel ladders up and down which the men had to go from time to time carrying damper rods. The deceased man was killed by falling from one of the ladders The only person who saw the accident happen was A., a fellow-workman under whom the deceased man worked; he saw the deceased man falling backwards from the ladder; he could not say whether the man was ascending or descending the ladder when he fell; he did not see anything in his hand before he fell or while he was falling; nor see anything falling with him.

After the accident a damper rod was found at the bottom of the ladder from which the man fell. A few minutes before the accident happened, A. had requested him to get a damper rod. There was a conflict of evidence as to whether the ladders were a dangerous means of getting to and from the platforms for a man carrying a damper rod. The deceased was a healthy man, fifty-seven years of age. At the trial of an action for damages for negligence, the Trial Judge found that the defendants had a system of working which was dangerous, that when the deceased man fell from the ladder he was descending and was carrying a damper rod, that his fall was caused by the failure of the defendants to provide a reasonably safe system of working, and that the plaintiff was entitled to damages. *Held*, that there was sufficient evidence to sustain the finding. *Larmour v. Belfast Corporation.*
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MASTER AND SERVANT—WORKMEN'S COMPENSATION—*Injury to Workman—Agreement to accept compensation—Ignorance of option to claim compensation or to take other proceedings—Workmen's Compensation Act (Northern Ireland)*, 1927 (17 & 18 *Geo.* 5, c. 16), *s.* 29, *sub.-s.* (1)—*Acceptance of compensation under the Act—Claim to recover damages at common law for the same injuries.* The plaintiff on 15th November, 1943, was injured by an accident arising out of and in the course of his employment by the defendants, and was disabled. On 18th December, 1943, he went to the defendants' place of business and had a conversation with a clerk in the defendants' employment who had charge of claims by workmen under the Workmen's Compensation Act, about the amount to which he was entitled under the Act in respect of the injuries which he had received. At this interview the clerk produced a form of receipt commencing with a declaration that having elected to take compensation under the Workmen's Compensation Act, 1927, the plaintiff agreed to accept during total disablement the weekly sum of £1 15*s.* 0*d.* in satisfaction of the compensation payable by the defendants for the accident; £1 15*s.* 0*d.* was the weekly amount to which the plaintiff was entitled under the Act. The plaintiff signed this document knowing that the weekly payments under it were to be made by the defendants in respect of their liability under the Workmen's Compensation Act, 1927, but not knowing of any right of action against the defendants which he might have independently of the Act, and not appreciating the meaning or the effect of the election which he purported to make. The defendants paid the agreed sum to the plaintiff every week until 19th March, 1944, when the payments ceased; he signed a receipt for each payment; until 3rd January, 1944, the receipts were all on the original form of agreement, the subsequent receipts were on separate vouchers, the word "compensation" was written on all of them, and none of them was stated to have been given without prejudice to the plaintiff's rights independently of the Act. On 21st January, 1944, the plaintiff's solicitor wrote to the defendants alleging that the plaintiff's injuries were caused by the negligence and breach of statutory duty of the defendants, and claiming damages; a correspondence ensued in the course of which the defendants' solicitors stated that they could not see that the defendants were under any liability at common law and that it was not a certainty that there was any liability under the Workmen's Compensation Act. The plaintiff learned of his rights against the defendants at common law a few weeks before 19th March, 1944. In an action brought by the plaintiff to recover damages for negligence and breach of statutory duty by the defendants causing the plaintiff's injuries. *Held* (1), That the signing by the plaintiff of the receipt form purporting in terms to make an election did not constitute a valid and final election by reason of his want of knowledge of his alternative rights and his ignorance of his right to elect under section 29, sub-section (1) of the Workmen's Compensation Act (Northern Ireland), 1927, between his remedy under the Act and his remedy independently of it. (2), That such election was not made final or binding on the plaintiff by the subsequent acceptance by him of weekly payments of compensation before he became aware of his right so to elect. (3), That the plaintiff was entitled so to elect notwithstanding that for a few weeks after he became aware of his right to do so he accepted payments of compensation, the receipts for which con-

tained no declaration of election and which were made by an employer who expressed doubts as to the plaintiff's right to compensation. (4), That the plaintiff was entitled to damages giving credit for the amount of the weekly payments received by him. *Moran v. Howard & Company, Limited.* .. .. K.B.D. 131

NEGLIGENCE—*Contributory Negligence—Cause of injury.* As a person was posting a letter it was blown on to the public street, and a boy ran off the footpath on to the carriageway to recover it, without looking to see if any vehicle was approaching ; he picked up the letter and immediately after doing so he was struck by a motor lorry driven by the servant of the defendants and was killed ; the distance from the place where he left the footpath to the place where he was struck was at least 30 feet ; at the time of the accident there was clear daylight, and there was nothing to obstruct the boy's view of the lorry, or the lorry driver's view of the boy. In an action brought by the boy's father and personal representative for damages for negligence in the driving of the lorry, the judge who tried the case held that the boy was guilty of negligence in leaving the footpath and running on the carriageway as he did, and that the driver of the lorry was not guilty of any negligence and could not have avoided the accident, and he dismissed the case. On a motion by the plaintiff for a new trial of the action the Court of Appeal (Black J. dissenting), found on the evidence that the driver of the lorry and the deceased boy were both guilty of negligence, and that the driver of the lorry could by the exercise of reasonable care have avoided the accident, but *Held*, that it was also necessary to determine whether the deceased boy by the exercise of reasonable care could have avoided the accident, and that if the boy could have thus avoided the accident, the action must be dismissed on that ground. The questions to be submitted to the jury in actions for negligence when the injured person and the defendant were both guilty of negligence considered. *Campbell v. John Kelly, Limited.* .. C.A. 70

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SUMMARY JURISDICTION—INDICTABLE OFFENCE—*Procedure—Summary Jurisdiction and Criminal Justice Act (N.I.), 1935, sec. 12, sub-secs. (1), (2)—Time limitation—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict., c. 93), section 10, par. 4—Applicability to indictable offences triable summarily.* By a Summons, dated 17th March, 1944, the defendant was charged with stealing certain articles of the value of £5 18*s.* 6*d.* on 24th and 27th January, 1943. At Petty Sessions the complainant having stated the facts which he proposed to prove the Court thought it expedient to deal summarily with the offence, and the defendant when informed by the Court of her right to be tried by a jury consented to be dealt with summarily. The defendant pleaded "not guilty." The Court, without hearing any evidence, dismissed the case on the ground that the prosecution was barred by sec. 10 of the Petty Sessions (Ireland) Act, 1851. On a Case Stated as to (1) whether the case could be dealt with summarily before hearing the evidence of any witness, and (2) whether the limitation period of six months under section 10, paragraph 4, of the Petty Sessions (Ireland) Act, 1851, applies in the case of an indictable offence when dealt with summarily under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, *Held* (by Andrews, L.C.J. and Black, J.):—1. That a magistrate is entitled to raise a question of law in a Case Stated pursuant to the provisions of the Summary Jurisdiction Act, 1857, for the opinion of a Superior Court although such question was not raised at Petty Sessions. 2. That the Summary Jurisdiction and Criminal Justice Act (N.I.), 1935, section 12 (1), confers a jurisdiction to deal summarily with certain indictable offences, and section 12 (2) prescribes the procedure to be adopted when the Court decides to exercise that jurisdiction. 3. That the time limitation in section 10, para. 4, of the Summary Jurisdiction Act, 1851, does not apply in the case of an indictable offence dealt with summarily under section 12 of the Summary Jurisdiction and Criminal Justice Act (N.I.), 1935. *Crozier v, Montgomery* .. .. K.B.D. 15

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WILL—CONSTRUCTION—*Devise to son—Gift over should devisee die without an heir.* The owner of a farm held in fee simple devised it to his son W., and the will then proceeded as follows:—"Should my son W. die without an "heir my farm shall go to my son J." or if my son J. should predecease my "son W. my farm is to go to his family." *Held* that W. took an estate in fee simple in the farm subject to an executory limitation over to J. or his family if W. should die without an heir of his body. *Dundee v. Dundee.* .. .. CH.D. 61

WORKMEN'S COMPENSATION—WORKMAN IGNORANT OF HIS RIGHTS—AGREEMENT .. 131
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